TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 83

MAX CARR, ET AL., PETITIONERS,

vs.

R. A. YOUNG, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR CERTIORARI FILED MAY 6, 1960
CERTIORARI GRANTED JUNE 20, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 83

MAX CARR, ET AL., PETITIONERS,

vs.

R. A. YOUNG, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

	Original	Print
Record from the Chancery Court of Pulaski County, Arkansas, First Division		
Caption	1	1
Complaint in the case of Max Carr vs. R. A. Young, No. 112819	2	2
Exhibit "A"—Affirmation of Max Carr, dated June 10, 1959	13	8
Exhibit "B"—Newspaper article from Arkansas Gazette, Little Rock, Sunday, April 12, 1959, "Citizens Council to Scan Affidavits of High School, College Teachers"	16	10
Exhibit "C"—Newspaper article from Arkansas Gazette, Little Rock, Thursday, April 30, 1959, "Guthridge Says Leftists Control State Teachers"	19	12
Note re summons and sheriffs' returns	23	14
Motion to dismiss	24	14
Answer	26	15
Exhibit "A"—Memorandum opinion and judgment in Shelton v. McKinley, Civil No. 3708 filed in U.S.D.C. for the Eastern District of Arkansas, Western Division	29	17

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 8, 1960

	Original	Print
Record from the Chancery Court of Pulaski County, Arkansas, First Division—Continued		
Notice of appeal	50	31
Designation of record	51	32
Complaint in the case of Ernest T. Gephardt v. Everett Tucker, No. 112877	52	33
Exhibit "A"—Affidavit of Ernest T. Gephardt, dated April 7, 1959	65	41
Exhibit "C"—Transmittal letter of Ernest T. Gephardt to Mr. Ben Rowland, dated May 4, 1959	66	42
Clerk's note re Exhibits "D" and "E"	66	42
Exhibit "B"—Additional affidavit of Ernest T. Gephardt	67	43
Note re summons and sheriff's return	68	43
Motion to dismiss	69	44
Separate answer of defendants Everett Tucker, Jr., et al.	71	45
Notice of appeal	73	46
Designation of record	74	47
Decree, Reed, Chancellor	75	48
Transcript of testimony	79	51
Appearances	79	51
Testimony of Max Carr— direct	80	52
Offer in evidence	83	53
Testimony of Max Carr— cross	83	54
Offer in evidence	87	56
Testimony of Max Carr— cross	88	56
redirect	92	59
recross	93	59
John Caldwell— direct	99	62
cross	103	65
redirect	105	66
recross	106	67

	Original	Print
Record from the Chancery Court of Pulaski County, Arkansas, First Division—Continued		
Transcript of testimony—Continued		
Testimony of Ernest Gephardt—		
direct	108	67
cross (by Mr. Light)	113	70
cross (by Mr. Bennett)	115	72
Terrell Powell—		
direct	128	79
cross (by Mr. Light)	130	81
cross (by Mr. Bennett)	131	82
Bruce Bennett—		
direct	133	83
cross	138	86
Amis Guthridge—		
direct	140	87
Offers in evidence	156	96
Remarks of Chancellor Murray O. Reed at conclusion of trial	159	98
Exhibits:		
No. "1"—Contract for the 1959-60 academic year—University of Arkansas—Official Appointment	162	99
No. "2"—Letter from Attorney General of Arkansas to Ben D. Rowland, dated April 21, 1959	162	100
No. "3"—Deposition of Artie Gregory, dated June 25, 1959	163	103
No. "4"—State of Arkansas, Executive Department, Proclamation of Governor calling the Second Extraordinary Session of 1958	164	112
No. "5"—Address of Governor Orval E. Faubus, delivered to the Second Extraordinary Session of the General Assembly August 26, 1958 with Secretary of State's certificate	165	113
No. "6"—Act No. 10 of 1958 Second Extraordinary Session. Approved September 12, 1958 with Secretary of State's certificate	173	125

	Original	Print
Record from the Chancery Court of Pulaski County, Arkansas, First Division—Continued		
Exhibits—Continued		
No. "7"—Letter from Attorney General to George N. Anderson, dated May 27, 1959 stating Attorney General's opinion in regard to "affirming" rather than "swearing"	177	129
Reporter's and clerk's certificates (omitted in printing)	178	129
Proceedings in the Supreme Court of the State of Arkansas	180	130
Opinion, Smith, J.	180	130
Judgment	186	135
Petition for rehearing	187	136
Order denying petition for rehearing	189	137
Clerk's certificate (omitted in printing)	190	137
Order allowing certiorari	191	138

[fol. 1]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS, FIRST DIVISION

CAPTION

PLEAS

before Honorable Murray O. Reed, Chancellor, Pulaski Chancery Court, First Division, June 25, 1959, in the following styled causes of action, to-wit:

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiffs,

vs.

R. A. YOUNG, et al., Defendants.

and

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiffs,

vs.

EVERETT TUCKER, JR., et al., Defendants.

CONSOLIDATED FOR HEARING

[fol. 2]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated,
Plaintiff,

vs.

R. A. YOUNG, JR., Chairman, PAULINE R. HOELTZEL, DALLAS P. RANEY, PAUL SULLINS, L. C. CARTER, ROY C. RITTER, DR. PRESTON LOYCE HATHCOCK, FRED M. PICKENS, JR., EARL H. WILDY, and ROBERT H. SMITH, as members of the Board of Trustees of the University of Arkansas; BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS; JOHN T. CALDWELL, as President of the University of Arkansas; BRUCE BENNETT, Attorney General of the State of Arkansas, Defendants.

COMPLAINT—Filed June 10, 1959

Plaintiff, Max Carr, for his complaint herein alleges:

I.

Plaintiff is a resident of Washington County and a citizen of the State of Arkansas and of the United States. Since September, 1955, he has been employed by the defendant Board of Trustees of the University of Arkansas, as a member of the faculty of the University. He is presently employed in this capacity, holding the position of Associate Professor of Music. He has performed and is performing his duties in a satisfactory manner.

Plaintiff brings this action in his own behalf, and in be-
[fol. 3] half of all other persons who by reason of their employment in the teaching profession in Arkansas are similarly situated; they, and each of them, are members of a class of persons whose constitutional rights are being invaded; the members of the class of persons that he represents are so numerous as to make it impracticable to bring all of them before this Court; he, as a member of the class, can and will adequately and fairly represent all of the

members of the class; the character of the rights and legal status sought to be declared, enforced and protected for the class is several; and there is a common question of law and fact affecting the several rights of all the class and a common relief is sought.

II.

The defendant, Board of Trustees of the University of Arkansas, is a body politic and corporate created by Act of the General Assembly of the State of Arkansas, with power and authority to prescribe rules and regulations for the government and discipline of the University. Defendant Board is here being sued on its own behalf and as representing all the governing boards of public schools and educational institutions in the State of Arkansas which are similarly situated. All members of said class are charged with the duty of enforcing the provisions of Act 10 of the Second Extraordinary Session of the General Assembly of [fol. 4] Arkansas, 1958. Defendant Board as a member of the class can and will adequately and fairly represent all members of the class.

The defendant, Board of Trustees of the University of Arkansas, is an administrative agency and instrumentality of the State, exercising functions and performing duties under the general education laws of the State of Arkansas.

The defendants, R. A. Young, Jr., Pauline R. Hoeltzel, Dallas P. Raney, Paul Sullins, L. C. Carter, Roy C. Ritter, Dr. Preston Loyce Hathcock, Fred M. Pickens, Jr., Earl H. Wildy and Robert H. Smith, are the duly appointed, qualified and acting members of the Board of Trustees of the University of Arkansas; they, and each of them, are agents and administrative officers of the State of Arkansas and hold office and perform official duties and functions under the general education laws of the State; they, and each of them, are sued in their respective official capacities as members of a State Board.

Defendant, John T. Caldwell, is the duly appointed and qualified President of the University of Arkansas; is an agent and administrative officer of the State of Arkansas; is the agent, employee and servant of the Board of Trustees of the University of Arkansas and holds office and per-

forms official duties and functions pursuant to the general education laws of the State.

[fol. 5] The defendant, Bruce Bennett, is the duly elected and qualified Attorney General of the State of Arkansas and is being sued in his official capacity.

III.

The General Assembly of Arkansas at the Second Extraordinary Session of 1958 enacted Act 10, which Act was approved by Orval E. Faubus, Governor of Arkansas, on September 12, 1958, and which Act became effective and a part of the general laws of the State of Arkansas on that date. The emergency clause of said Act contained a finding by the General Assembly that the emergency enactment of this legislation was made necessary by the decisions of the United States Supreme Court concerning desegregation in the public schools.

Said Act 10 provided, among other things, that no Superintendent, principal or teacher shall be employed by any school district operating a public school until, as a condition precedent to such employment, such teachers shall have filed with the governing authority of such school district an Affidavit as to the names and addresses of all incorporated and/or unincorporated associations or organizations of which such teacher is or has been a member within the past five years, or to which such teacher is presently paying regular dues or to which regular contributions have [fol. 6] been made within the past five years.

On or about May 13, 1959, defendant, John T. Caldwell, acting pursuant to the provisions of said Act 10, caused a Memorandum dated May 13, 1959, to be distributed to certain administrative personnel at the University, concerning "Alternatives for Appointment Procedures." In substance said Memorandum stated that, since there was doubt as to the status of Act 10 because of the existence of a temporary injunction against enforcement of the Act, issued by the United States District Court, Western Division, Eastern District of Arkansas, alternative appointment procedures would be followed in making faculty appointments for the academic year 1959-1960. Subsequently, on May 19, 1959, plaintiff accepted a contract for continu-

ing appointment as Associate Professor of Music for the academic year 1959-1960. Said contract contained a clause which, in effect, stated that if Act 10 were held to be valid and plaintiff did not then execute the Affidavit required by said Act, his services would be terminated by the University.

Plaintiff, being a member of the Religious Society of Friends and being conscientiously opposed to taking an [fol. 7] oath or swearing in any form, has executed to be filed with the University an Affirmation, in which he stated that he is not now and never has been a member of any subversive organization. In said Affirmation, plaintiff listed his membership in the Arkansas State Music Teachers Association, the Music Teachers National Association, the American Association of University Professors. He further stated his willingness to answer any question which the University authorities might constitutionally ask in regard to any matter, including his associations and activities, touching upon his qualifications to continue on the faculty of the University. Since no question has been raised as to his performance of duties as a teacher, or as to any of his associations or activities, which the Board of Trustees might consider to adversely affect his position as Associate Professor of Music, plaintiff refused to list any other memberships or contributions which he might have made on the ground that such requirement was in violation of his constitutional rights. A copy of said Affirmation is attached hereto as Exhibit "A" and made a part of this Complaint.

Plaintiff declined to furnish any information other than that contained in the aforesaid Affirmation for the reason that the additional information required under the provi- [fol. 8] sions of Act 10 is constitutionally beyond the competence of the State of Arkansas to inquire into, and the requirement of furnishing such information as a condition precedent to continued employment as a teacher infringed upon his constitutional rights freely to associate with others in the exercise of their privileges of freedom of religion, free speech, free press and free assembly under the Fourteenth Amendment to the Constitution of the United States; infringed upon his rights of free and independent pursuit of happiness, of peaceable assembly to consult for the com-

mon good, of free communication of thoughts and opinions, and freedom of conscience, under the provisions of Article 2, Sections 2, 4, 6, and 24, of the Constitution of Arkansas.

Plaintiff alleges upon information and belief that pursuant to the requirements of the aforesaid Act 10, members of the teaching profession similarly situated have filed said Affidavits under duress or will be compelled to do so in order to continue their employment as teachers.

Defendant Board and others similarly situated have for many years entered into contracts with teachers for periods of a single academic year, said year beginning in the fall and ending in the spring of the following calendar year. Contracts of employment for the ensuing school year have been routinely offered to teachers currently in the employ [fol. 9] of the various institutions and school districts in the absence of timely notice for cause to the contrary. Defendant Board and other governing school bodies have threatened to refuse and, unless restrained by order of this Court, will refuse to members of the teaching profession currently employed by them contracts of employment for the academic year 1959-1960, and for ensuing school years, if said teachers have not executed the aforesaid Affidavit required by said Act 10, such refusal to be based solely on the ground that their employment is prohibited by said Act.

Information which said Act 10 requires to be filed in the aforesaid Affidavit as a condition precedent to further employment is not appropriate or relevant to a determination of the qualification for continued employment as teachers, or suitability for employment of those who apply for such employment, under standards which the State of Arkansas may constitutionally impose. The purpose of said Act 10 is not to obtain information appropriate or relevant under any such permissible standard, but rather the Act is designated to intimidate plaintiff and other teachers and to coerce them into not exercising their rights under the State and Federal Constitutions as heretofore alleged. Publication of the information required to be filed will result in [fol. 10] the harassment not only of plaintiff and other teachers, but of school authorities as well, who permit the

exercise of any currently unpopular constitutional right. Plans for such use of said information have already been made by certain extremist groups, as shown by the statements of one Amis Guthridge, as quoted in the Arkansas Gazette, copies of which statements are attached hereto as Exhibits "B" and "C" and made a part of this Complaint.

Said Act as it is sought to be applied to the plaintiff, and others similarly situated, in requiring the filing of the aforesaid Affidavit as a condition of employment in the teaching profession by the State of Arkansas, or its instrumentalities, is violative of the Fourteenth Amendment to the Constitution of the United States in that it deprives them of liberty and property without due process of law, denies them the equal protection of the laws, infringes upon their rights of freedom of speech, freedom of the press, freedom of assembly and association and to petition for redress of grievances, and denies them privileges and immunities of citizens of the United States.

Act 10 is unconstitutional under Article 2 of the Constitution of the State of Arkansas in that the purposes and effects of the said Act are to prevent plaintiff and other teachers from exercising rights guaranteed to them under [fol. 11] said Article, to-wit:

> The right of acquiring, possessing and protecting property and reputation and pursuing their own happiness, Section 2; The right of equality of all persons before the law, Section 3; The right peaceably to assemble to consult for the common good and to petition by address or remonstrance, the government, Section 4; The right to free communication of thoughts and opinions, and the right freely to write and publish one's sentiments, Section 6; The right not to be deprived of life, liberty or property without due process of law, Section 8; The right to have the same privileges and immunities as any other citizen or class of citizens, Section 18; and The right of conscience, Section 24.

Act 10 is unconstitutional under the provisions of Article 6, Section 19, of the Constitution of Arkansas, in that the subject matter of said Act was not within the purview of

the Governor's Proclamation calling the Second Extraordinary Session of the General Assembly of 1958.

Unless enjoined by order of this Court, the acts complained of will occur and continue to occur. Plaintiff and others similarly situated are threatened with great, imme-
[fol. 12] diate and irreparable injury and have no adequate remedy at law.

Wherefore, plaintiff prays the Court:

1. That a temporary restraining order be entered restraining the defendants, and all others similarly situated, pending hearing and final determination of the cause on the merits, from the enforcement, operation or execution of said Act 10 and from interfering in any way with plaintiff's employment by reason of his failure to execute and file the Affidavit required by said Act.

2. That the Court enter a declaratory judgment that said Act 10 is unconstitutional and void.

3. That the Court then enter a permanent injunction restraining the defendants, and all others similarly situated, from the enforcement, operation or execution of said Act 10 in any manner.

4. That the Court grant such other or different relief in the premises as may be equitable and proper.

Edwin E. Dunaway, Solicitor for Plaintiff.

[fol. 13]

EXHIBIT "A" TO COMPLAINT

AFFIRMATION

STATE OF ARKANSAS)
: ss
COUNTY OF PULASKI)

The undersigned, being conscientiously opposed to taking an oath or swearing in any form, does solemnly and truly declare and affirm that he is the plaintiff in the fore-

going Complaint, and that the facts therein stated are true to the best of his knowledge and belief.

/s/ Max Carr
Max Carr

Subscribed before me this 10th day of June, 1959.

/s/ Ravenell Livingston
Notary Public

My Commission Expires:

February 2, 1963.

(Seal)

[fol. 14]

AFFIRMATION

STATE OF ARKANSAS)
: ss
COUNTY OF PULASKI)

I, Max Carr, holding the position of Associate Professor of Music at the University of Arkansas, being conscientiously opposed to taking an oath or swearing in any form, do solemny and truly declare and affirm:

I am now or have been within the past five years a member of the following organizations: Arkansas State Music Teachers Association, Music Teachers National Association, and the American Association of University Professors.

I am not now, nor have I ever been, to my knowledge, a member of any subversive organization.

I will gladly answer any question which the authorities of the University may constitutionally ask me in regard to any matter, including my associations and activities, touching upon my qualifications to continue as a teacher in the State of Arkansas.

Since no question has been raised as to my performance of duties or as to my associations or activities which might adversely affect my position as a teacher, I respectfully refuse to list any other memberships or contributions on [fol. 15] the ground that such requirement is a violation

of my rights under the Arkansas and United States Constitutions.

/s/ Max Carr
Max Carr

Subscribed before me this 10th day of June, 1959.

/s/ Ravenell Livingston
Notary Public

My Commission Expires:

February 2, 1963.

(Seal)

[fol. 16]

EXHIBIT "B" TO COMPLAINT

ARKANSAS GAZETTE
LITTLE ROCK, SUNDAY, APRIL 12, 1959

CITIZENS COUNCIL TO SCAN AFFIDAVITS OF HIGH SCHOOL, COLLEGE TEACHERS

The Capital Citizens Council of Little Rock, a segregationist group is not satisfied that all the employees of some high schools and state-supported colleges are complying properly with Act 10 of 1958. This is the law that requires any employe of a public school or college to list, as a condition of his employment, all the organizations he has been a member of or contributed money to in the last five years.

Acting on information received from Citizens Council members, the Council announced yesterday that it was going to examine and photostat the affidavits filed by employes at five high schools, one college and the University of Arkansas.

This came from Amis Guthridge, attorney for the Citizens Council, in a statement given to United Press International.

Gutlridge said that his information was that "many professors in two institutions of higher learing" were committing perjury in their affidavits by not listing all the organizations to which they belong.

He said he understood that the affidavits were public [fol. 17] records and the Citizens Council was going to photostat them, first at Arkansas State Teachers College at Conway, the University of Arkansas at Fayetteville and the University Medical Center at Little Rock.

He also listed the high schools at Fayetteville, Van Buren, Fort Smith, Charleston and Hoxie. These are five of the eight Arkansas school districts that have integration, though not all of them have integration in their high schools.

Guthridge said he didn't include Little Rock on that list because he had been told by several members of the Little Rock School Board that the Board would make the Little Rock affidavits public.

Guthridge said, "Our investigation reveals that many professors are listing their membership in such organizations as their churches, civic clubs and the Red Cross, but although many are outspoken members of the NAACP, Urban League and the Women's Emergency Committee to Open Our Schools, they are openly stating that since such membership might reflect on them, they are not listing them in their sworn affidavits."

Act 10, introduced by State Senator Artie Gregory of North Little Rock, was adopted by the special legislative session in August 1958.

Until this week nothing was heard of it, except for an [fol. 18] oblique reference by President Carl Reng of Arkansas State College, made during a speech to the 1959 General Assembly, that none of the faculty members had objected to it.

So far only one school or college employee has flatly refused to sign an Act 10 affidavit and he is J. O. Powell, vice principal of Central High at Little Rock. He listed all his organizations for public scrutiny but said he would not submit to making that a condition of his employment.

Whatever other teachers, professors and administrators may think of the law, they are keeping it to themselves. In some school districts the administrators have told their teachers that while the affidavit may be a bitter pill, it is the law and that they might as well sign and do as little grumbling as possible.

Guthridge's statement yesterday was the first public indication, other than J. O. Powell's refusal to sign, of any reaction against the Act 10 requirement.

[fol. 19]

EXHIBIT "C" TO COMPLAINT

ARKANSAS GAZETTE

Little Rock, Thursday, April 30, 1959

GUTHRIDGE SAYS LEFTISTS CONTROL STATE TEACHERS

Fayetteville, April 29. A segregationist leader said today that 98 per cent of Arkansas's school teachers are "chained and bound to silence by the national and state leftwing, Socialist organizations which control their positions and destinies."

Amis Guthridge of Little Rock, counsel for the segregationist Capital Citizens Council, said communism had a "beachhead in Arkansas education" and that "headquarters for this alien 'brain laundry' in Arkansas is the University of Arkansas at Fayetteville and the Medical Center in Little Rock."

Guthridge made the charge in a statement prepared for "The Traveler", student daily newspaper on the U of A campus here. The paper had asked for his comment on opposition among U of A faculty members to Act 10 of 1958, which requires teachers in tax-supported schools to sign affidavits listing their organizational memberships and contributions.

BOUND TO SILENCE

"Of the 14,000 teachers in public schools and state-[fol. 20] supported colleges in Arkansas," Guthridge said, "I believe that 98 per cent of them are among our finest citizens. However, that 98 per cent is chained and bound to silence by the national and state leftwing, Socialist organizations which control their positions and destinies. They are followers and will do what they are told. Communists and their camp followers have great influence in the

public education field all over the United States. They have a beachhead in Arkansas education, probably as strong as that in the Communist-indoctrinated Columbia University in New York City."

Guthridge said Act 10 is "the 'law of the land' in Arkansas.". He added: "Many of the teachers who howled defiance at that law criticize me for not following the United States Supreme Court's so-called law of race mixing when they should know that the courts cannot pass a law."

Saying that "teachers all over Arkansas" are signing Act 10 affidavits, Guthridge said:

"They are not afraid. But a rat is afraid of the light."

NOTES BOARD'S POSITION

Guthridge took note of an announcement that the University Board had decided that affidavits signed by faculty members would be considered private material and said:

"They should remember that, besides the courts, the [fol. 21] people still have in each county a Grand Jury which can look at the affidavits as well as other goings-on. Also the Legislative Council can, and I believe will, cooperate with parents who file particular charges."

"As to the University professors who you say claim that Act 10 is unconstitutional, immoral and a breach of contract, I have this to say," Guthridge continued. "It is refreshing to me that they know something about the word moral. Even if they are forced to publicly once use the word, even in a negative sense * * * those professors who say that Act 10 is a breach of contract, I say that if they do not comply, they will not have a contract. And further, I say that you University students will be better off if those complaining refuse to sign through fear of discovery and go back to Germany, East European countries and New York City, from whence some came."

CALLS ACT 10 GOOD

Guthridge said Act 10 is a good law "if you do not belong to Communist, pro-Communist or other organizations like the NAACP, the American Civil Liberties Union,

the Urban League, the American Association of University Professors or the Women's Emergency Committee to Open Our Schools. If a teacher does, he should silently fold his tent and go north like Dr. Lee Lorch. But, if he is a [fol. 22] real American teacher, he should be proud to sign."

Guthridge told The Traveler he could not brand the American Association of University Professors as being Communist-indoctrinated. He added, though, that some members of the group had acted in "a pro-Communist way."

"If the organization is not pro-Communist," he added, "then let them stand up like men and tell us where they stand."

Guthridge said some persons might refuse to sign Act 10 affidavits although they had nothing to hide, "but if they feel that way," he said, "they ought to get the heck out of Arkansas."

[File endorsement omitted]

[fol. 23]

NOTE RE SUMMONS AND SHERIFFS' RETURNS

The Return of the Sheriff of Pulaski County, Arkansas, shows service of summons on Dallas P. Raney, in person; Bruce Bennett, in person; Pauline R. Hoeltzel, by serving her Mother at place of abode in said county, June 11, 1959.

The Return of the Sheriff of Ashley County, Arkansas, shows service of summons on Paul Sullins, June 23, 1959.

[fol. 24]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

[Title omitted]

MOTION TO DISMISS—Filed June 24, 1959

Comes Bruce Bennett, Attorney General of the State of Arkansas, pro se, and moves the court to dismiss this suit against this defendant for the reason that:

I.

The Attorney General of the State of Arkansas is not a proper party, nor a real party in interest to this action.

II.

The Attorney General of the State of Arkansas is not properly a nominal defendant, or otherwise a party to this suit, under the laws of the State of Arkansas.

III.

None of the relief requested by the plaintiffs would be effected by a judgment against this defendant.

IV.

[fol. 25] Under the provisions of Ark. Stats. (1947) 34-2510, the Attorney General of the State of Arkansas is entitled to be heard in any proceeding where a statute, ordinance or franchise is alleged to be constitutional, but may not, under the authority of this statute, be made a party defendant to such proceeding.

Wherefore, the defendant Bruce Bennett, Attorney General of the State of Arkansas, prays this court to dismiss the complaint filed herein as to him, for costs and all other proper relief; further reserving under this motion, the right to be heard in this proceeding as conferred by Ark. Stats. (1947) 34-2510.

Bruce Bennett, Attorney General, State of Arkansas, pro se.

[File endorsement omitted]

[fol. 26]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

ANSWER—Filed June 24, 1959

The defendants, Board of Trustees for the University of Arkansas, John T. Caldwell, President of the University of Arkansas, for their answer to the complaint of the plaintiff, states:

I.

Denies that the plaintiff and all other persons who are members of the teaching profession in Arkansas are a class of persons. Admits all other allegations contained in paragraph I. of the Complaint.

II.

Denies that the Defendant Board can be sued as representing all of the governing boards of public schools and educational institutions in the State of Arkansas. Admits [fol. 27] all other allegations of paragraph II. of the complaint.

III.

Denies that Act 10 of 1958 Second Extraordinary Session of the Sixty-first General Assembly of Arkansas is unconstitutional in any respect and specifically denies that it violates the provisions of Article 2, Sections 2, 3, 4, 6, 8, 18 and 24 of the Constitution of Arkansas. Specifically denies that Act 10 is unconstitutional under the provisions of Article 6, Section 19 of the Constitution of Arkansas. Admits that the General Assembly of Arkansas enacted Act 10 in 1958 which became an act on September 12, 1958. Admits that an affidavit is required by Act 10. Admits that defendant, John T. Caldwell, issued a memorandum dated May 13, 1959. Denies each and every other allegation of paragraph III. of the complaint.

IV.

Specifically denies that Act 10 is unconstitutional under the Constitution of the United States. This question has been adversely decided against the plaintiff in B. T. Shelton, et al. v. Ed I. McKinley, et al., United States District Court, Eastern District of Arkansas, Western Division, case #3708, a copy of the opinion of said Court is attached hereto and made a part of as Exhibit A.

[fol. 28] V.

Denies each and every other material allegation of the complaint.

Wherefore, the defendants pray the court;

1. That the complaint of the plaintiff be dismissed.

2. That the court enter a declaratory judgment that Act 10 is unconstitutional.

3. That the temporary and permanent injunctions be denied.

4. That cost herein be granted the defendants and all other proper and equitable relief.

Bruce Bennett, Attorney General, State of Arkansas.

[fol. 29]

EXHIBIT "A" TO ANSWER

IN THE DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

Civil No. 3708

B. T. SHELTON, et al., Plaintiffs,

v.

ED. I. MCKINLEY, JR., et al., Defendants.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM

This is a class action in which the plaintiffs seek declaratory and injunctive relief against the enforcement of Act 10 of the Second Extraordinary Session of the Arkansas Legislature, held in August, 1958, and of Act 115 of the regular 1959 session of that body. It is claimed that those statutes are violative of the First and Fourteenth Amendments to the Constitution of the United States. Upon the filing of the complaint, a statutory court of three judges was convened, and the case has been tried to that court.

Act 10 provides in substance that no person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing

****

[fol. 30]

1. The plaintiffs are: B. T. Shelton, a Negro school teacher employed in the Little Rock public school system; the Arkansas Teachers Association (ATA), a professional organization, the membership of which consists of Negro school teachers and college professors in the State of Arkansas; and T. W. Coggs, the Executive Secretary of ATA. The plaintiff, Shelton, sues for himself and others similarly situated; and the ATA and Coggs are suing for the benefit of members of the Association.

all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license.

[fol. 31] Section 1 of Act 115 makes it unlawful for any member of the National Association for the Advancement of Colored People (hereinafter called NAACP) to be employed by the State of Arkansas or any of its subdivisions,

or by any school district, and declares that the prohibition of such employment shall continue so long as membership in the NAACP exists. Section 2 authorizes employing agencies to require from any employee an affidavit as to whether he is a member of the NAACP and a refusal to furnish the affidavit is made a ground for dismissal from employment.

Section 3 of the Act provides in substance that any person discharged from or declared ineligible for public employment on account of NAACP membership may, within four months of such dismissal or declaration, petition the circuit court for an order to show cause why a hearing on the charges against him should not be had; that until the final judgment on such hearing the dismissal or declaration of ineligibility shall be stayed; that the hearing shall consist of the taking of evidence with the right of cross-examination, and that the burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

The operative sections of this statute are preceded by [fol. 32] a preamble, the gist of which is that the NAACP has been guilty of creating racial strife and turmoil in the State of Arkansas; that it has threatened progress in race relations in the State; that it has striven to stir up dissatisfaction and unrest among Negroes, and that because of its purposes and activities membership therein is incompatible with the "peace, tranquility and progress that all citizens have a right to enjoy". The preamble also contains a recitation that the Special Education Committee of the Arkansas Legislative Council has found that the NAACP "is a captive of the international communist conspiracy".

When the suit was originally filed, B. T. Shelton was the only named plaintiff, and the original defendants were the Little Rock, Arkansas Special School District, the members of the Board of Directors of that District, and the Superintendent of Schools. Subsequently, an amended complaint was filed adding ATA and its executive secretary as plaintiffs, and adding as defendants the Pine Bluff, Arkan-

sas, Special School District, the members of the School Board of that District and the Superintendent of Schools, and the Board of Trustees and President of the Arkansas A. M. & N. College for Negroes.

****

2. The Arkansas Legislative Council is an agency of the Arkansas Legislature which functions during interims between sessions, makes studies of legislative [fol. 33] problems, and reports thereon, to the Legislature.

Also named as defendants were Bruce Bennett, Attorney General of the State of Arkansas, and Frank Holt, Prosecuting Attorney of the Sixth Judicial Circuit of Arkansas, which includes Little Rock. Both the attorney general and the prosecuting attorney filed motions to dismiss, and at the commencement of the trial it was agreed that the complaint might be dismissed as to them without prejudice. Also named as members of the Pine Bluff School Board were Ralph Mitchell, Jr., and J. C. Langley. It developed that one of these gentlemen had never been a member of the Board, and that the other had resigned prior to the filing of the suit, and it was agreed that the case might be dismissed as to them.

Reduced to essentials, the claim of the plaintiffs is that the two statutes in question deprive the plaintiff Shelton and others similarly situated, and the members of the ATA of liberty and property without due process of law; that they deny them the equal protection of the law; that they infringe upon their rights of freedom of speech, freedom of the press, freedom of assembly and association and to petition for redress of grievances, and deny them privileges and immunities of citizens of the United States. It is further claimed that Shelton and the plaintiff class are threatened with irreparable injury and have no adequate remedy at law.

In their answers the defendants deny the claim of the [fol. 34] plaintiffs that the statutes are unconstitutional; they further contend that this court is without jurisdiction, and that this is not a proper class action. In the alterna-

tive, they ask that proceedings herein be stayed until the two statutes can be construed by the Arkansas state courts.

It appears that plaintiff Shelton has been employed as a teacher in the Little Rock Public School system for a number of years, and that he is a member of the NAACP; that on April 3 of the current year he and other teachers in the Little Rock system were called upon to submit the affidavits required by Act 10; that he declined to do so on the ground that the statute violated his constitutional rights; and that subsequently he received a letter signed by three members of the Little Rock School Board advising him that his contract had not been renewed for the 1959-60 school year and would not be renewed. By reason of a somewhat peculiar situation that existed with respect to the Little Rock School Board when the suit was filed and on the day of trial, which situation we find it unnecessary to detail, there is some uncertainty with respect to the exact status of Shelton's contract and those of certain other teachers who declined to submit the Act 10 affidavits. It has been stipulated, however, that the Little Rock School Board will act in conformity with ruling State statutes, and it is plain that if those statutes stand, Shelton will inevitably feel their [fol. 35] impact if he has not already done so. Thus, we are satisfied that Shelton's situation presents a case or controversy between him and the Little Rock School District with respect to which this court has jurisdiction.

The claim that this is not a proper class action calls for no extended comment, since it is now well settled that a suit of this kind, while not a "true class action" can be maintained for the benefit of the named plaintiff and "others similarly situated" under the provisions of Rule 23, F. R. C. P., 28 USCA. (See the full discussion of such an action and of the effect of a judgment therein contained in 3 Moore's Federal Practice, 2d Ed. pp. 3442-3450, 3455-56, and 3465-68).

With respect to the contention that this court should not proceed herein until the statutes have been construed by the State courts, we, of course, respect the doctrine of "equitable abstention", as it is sometimes called, and it has been applied in this district not infrequently. However, this doctrine is discretionary in its application, not jurisdic

tional. We see no problems of statutory construction in this case which would move our discretion to stay proceedings as the defendants desire. Cf. NAACP v. Patty, DC, Va. 159 F. Supp. 503; see also dissenting opinion of Judge Parker in Bryan v. Austin, DC, S.C. 148 F. Supp. 563, 567. However, this is contract time with the school districts in Arkansas. Both teachers and directors of the districts [fol. 36] need to know where they stand with respect to both acts. Should proceedings herein be stayed, inevitably there would be undesirable delay and confusion likely to be accompanied by a multiplicity of suits in various sections of the State. Accordingly, we are of the view that the public interest calls for a determination of the Constitutional question presented by the record.

While there is certain language in the complaint that may indicate that the plaintiffs feel, at least to a certain extent, that the two statutes must be read together, we feel that they should be considered separately. Cf. Garner v. Los Angeles Board of Public Works, 341 U. S. 716, 720. And in view of certain decisions of the Supreme Court presently to be mentioned, we are satisfied that Act 10 is constitutional. On the other hand, it is clear that Act 115 is unconstitutional.

Act 10, unlike 115, does not make past or present membership in any organization a ground for discharge of or for refusal to comply with employ of a school teacher or college professor. It simply requires the local school boards and the governing bodies of institutions of higher learning to ascertain the affiliations of their respective faculties. Once that information has been furnished, so far as Act 10 is concerned, the local board or the governing body of a college is free to take any action it may choose with respect [fol. 37] to the employment status of a given individual.

A public employer has a right to know the organizations to which its employees, including school teachers, belong or have belonged, or to which they are making or have made financial contributions. This right has been recognized in Garner v. Board, supra; Adler v. Board of Education of the City of New York, 342 U. S. 483; Beilan v. Board of Education School District of Philadelphia, 357 U. S. 399; and Lerner v. Casey, 357 U. S. 468.

In the Garner case the Court, in upholding a requirement that public employees sign an affidavit revealing whether they had been members of the Communist Party or of the Communist Political Action Association, and if so setting forth the dates and periods of membership, said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may well have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment . . . " (341 U. S. at 720).

[fol. 38] In Adler v. Board of Education of the City of New York, supra, there was before the Court a challenge of the New York statutes designed to clear subversives from employment in the public school system. It was claimed that those statutes violated the freedom of speech and assembly of persons employed or seeking employment in the public schools. The Court said: "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. Communications Assn. v. Douds, 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere . . . " (342 U. S. at 492) A little further on in the opinion, the Court, after announcing that it was adhering to the Garner case, supra, went on to state:

> " . . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have

> the right and the duty to screen the officials, teachers [fol. 39] and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (342 U. S. at 493)

Garner and Adler were both adhered to less than a year ago in Beilan v. Board of Education, supra, wherein the court upheld the discharge of a school teacher on account of his refusal to answer questions put to him by his superintendent relative to his communist affiliations and activities. The Court said:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school [fol. 40] teacher." (357 U. S. at 405)

Further on in the same opinion the Court said that there was no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness, and that such fitness "depends on a broad range of factors." (357 U. S. at 406). In discharging their annual tasks of selecting new teachers and determining which of the old ones should be retained in employment, Arkansas school boards and college trustees are not concerned alone with the professional training or instructional competency of their employees of applicants for employment, or even with their loyalty to this country. While

membership in a subversive organization, such as the Communist Party, is, of course, a relevant factor bearing upon a person's fitness for employment as a school teacher or college instructor, other factors are relevant as well. A school board in undertaking to select teachers is entitled to take into consideration not only an applicant's competency and loyalty, but also his or her personality, habits and manner of living, and social, professional, and political background and affiliations, to the end that it may select not only competent teachers, but those whose employment or retention in employment is to the best interest of all concerned.

****

[fol. 41] 3. In considering this case it is important to bear in mind that Arkansas, unlike certain other States, does not have any civil service system for its public school teachers. Those teachers usually are hired on a year-to-year basis, and while a wrongful discharge during a school year in breach of contract is actionable, the only specific security that a teacher has beyond the end of a year is the statutory provision that if a teacher is not notified within 10 days after the end of a school year that his contract has not been renewed, it is automatically renewed for the following year. Ark. Stats. 1947, Section 80-1304 (b); Wabbaseka School District No. 7 v. Johnson, 225 Ark. 982, 286 SW at 341.

This does not mean, of course, that the Legislature can require a local school district or institution of higher learning to make inquiries of its employees or applicants for employment that are wholly irrelevant to their suitability for employment. Thus, in National Association for the Advancement of Colored People v. Alabama, 357 U. S. 449, cited by the plaintiffs, it was held that the Association could not be compelled by a State court to disclose its membership lists in connection with an action brought by the State on account of its alleged noncompliance with the Alabama statutes dealing with foreign corporations. The Court said: "... The issues in the litigation commenced by Alabama ... were whether the character of petitioner [fol. 42] and its activities in Alabama had been such as to

make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank and-file members has a substantial bearing on either of them. (357 U. S. at 464)

We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government. We hold, however, that the mere failure of a teacher who was a member of the National Association for the Advancement of Colored People, to furnish the affidavit required by Act 10 while Act 115 was ostensibly in effect, thereby making himself ineligible for public employment by the terms of the latter Act, did not and does not compel or justify his discharge or render him ineligible for re-employment.

Taking up Act 115, there can be no question that the Act makes any member of the NAACP ineligible for public employment in the State of Arkansas. Section 3 of the Act, which gives to any person dismissed from or declared in- [fol. 43] eligible for employment under the provisions of the Act, a right to petition for an order to show cause why a hearing on such charges should not be had, does not change or modify the command of the Act. That section gives one who was dismissed or denied employment on the ground that he was a member of the NAACP, and who claims that he was not a member, an opportunity to obtain a hearing on that issue alone. Once membership is established, then discharge or a declaration of ineligibility automatically follows. Further, by the terms of the Act one who gives public employment to a member of the NAACP is subject to a fine of not more than $100 for each such offense.

Under the Fourteenth Amendment to the Constitution of the United States, as construed in Wieman v. Updegraff, 344 U. S. 183, and Slochower v. Board of Higher Education of the City of New York, 350 U. S. 511, the statute is clearly unconstitutional since it makes mere membership in the

NAACP a ground for dismissal from or a declaration of ineligibility for public employment, regardless of whether the employee or applicant involved had any knowledge of or sympathy with the aims and purposes of the organization, as declared by the Legislature, or had actively participated in the activities found by the Legislature to be anti-social and undesirable, or whether he was completely innocent of such knowledge, sympathy or participation and had joined and was desirous of maintaining his membership in the Association out of sympathy with its [fol. 44] publicly announced objectives which are clearly lawful.

Even if the recitals of the preamble to the statute to the effect that the NAACP is devoted to the creation of racial unrest and turmoil are taken at face value, there is no declaration that the purposes and activities of the organization are designed to overthrow the government or that they are violative of any statute.

While public employing agencies have a wide if not unlimited discretion in selecting their employees, it does not follow that the Legislature can by statute require such agencies to apply to wholly arbitrary and discriminatory standard in hiring and firing. On the contrary, Wieman v. Updegraff and Slochower v. Board, both supra, establish that such cannot be done.

This Court, of course, cannot do otherwise than follow the decisions just mentioned. Wieman v. Updegraff involved the constitutionality of a statute of Oklahoma which required each state officer and employee, as a condition of his employment, to take an oath stating that he was not, and had not been for the preceding five years a member of any organization listed by the Attorney General of the United States as "Communist front" or "subversive" and [fol. 45] which statute, as by the State Supreme Court, barred

4. See Judge Parker's discussion of a similar preamble to the South Carolina statute involved in Bryan v. Austin, supra. With regard to the statement that the NAACP is a captive of the communist conspiracy, it is to be noted that the Legislature did not find that such was a fact, but simply stated that a committee of the Arkansas Legislative Council had so found; and

> while the Attorney General of Arkansas testified at the trial of this case that the findings of that committee were before the Legislature when it adopted Act 115, he did not testify that the Legislature itself had ever adopted those findings as its own. Thus, it is unnecessary for us to decide whether the Legislature had a right to make such a finding, or to determine what effect should be given to it had it in fact been made.

persons from state employment solely on the basis of membership in such organization, regardless of their knowledge concerning the activities and purposes thereof. By an opinion in which all the Justices concurred, the Supreme Court held that the Act in suit, as thus construed, violated the Due Process Clause of the Fourteenth Amendment by making persons ineligible for public employment solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they be- [fol. 46] longed. In so doing the Court distinguished prior decisions involving state legislation aimed at safeguarding the public service from disloyalty, namely, Garner v. Board of Public Works, supra; Adler v. Board of Education, supra, and Gerende v. Board of Supervisors, 341 U. S. 56.

In the course of its opinion the Court said:

"There can be no dispute about the consequence visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and not emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and Garner, Adler and Gerende is decisive. Indiscriminate classification of innocent with

knowing activity must fall as an assertion of arbitrary power. The oath offends due process." (344 U. S. at 190-191).

And in Slochower v. Board of Education, supra, it was said:

". . . In Wieman v. Updegraff, 344 U. S. 183, we struck [fol. 47] down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. This case rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory'. 344 U. S. at 192." (350 U. S. at 556)

See also Sweezy v. New Hampshire, 354 U. S. 234, 242, 251.

Since the fact of association alone cannot be used to determine disloyalty or disqualification, it is obvious that mere membership in the NAACP cannot be made a bar to public employment.

While the plaintiffs are entitled to a declaratory judgment to the effect that the state of Arkansas cannot constitutionally require that a person be discharged from public employment or be declared ineligible therefor merely because he belongs to the NAACP, from which it necessarily follows that public hiring officials cannot be successfully prosecuted for declining to follow such a standard, it does not follow that this Court, as a court of equity, can compel any school board to hire a person as a teacher, or to retain him in its [fol. 48] employment, or to forbid it to discharge him. This is true because of the well settled principle that an equity court, at least in the absence of a statute or of a situation where an employee has a vested right to or interest in his employment, will not interfere by injunction with the power of an employer to determine whom he will employ or retain in his employment. As we have seen, school teachers in Arkansas have no vested rights in their jobs, and no right of re-instatement if wrongfully discharged. If a teacher is discharged in violation of his contract, his

remedy is an action for damages. Such being the case, we do not believe that injunctive relief is appropriate here, nor, from a practical standpoint, do we think it necessary at this time.

It Is, Therefore, by the Court Considered, Ordered, Adjudged and Decreed:

1. That without objection the motions to dismiss filed herein by Honorable Bruce Bennett, Attorney General of the State of Arkansas, and by Honorable Frank Holt, Prosecuting Attorney of the Sixth Judicial Circuit of the State of Arkansas, are granted without prejudice.

2. That without objection the motions to dismiss filed by the defendants Ralph Mitchell, Jr. and J. C. Langley are granted.

3. That to the extent that the plaintiffs seek declaratory and injunctive relief with respect to Act 10 of the Second [fol. 49] Extraordinary Session of the 61st General Assembly of the State of Arkansas, the complaint and amended complaint are without merit and are dismissed with prejudice.

4. That the prayer of the plaintiffs for declaratory relief with respect to Act 115 of the regular session of the 62nd General Assembly of the State of Arkansas be, and the same hereby is granted, and that said statute be, and it hereby is, adjudged to be invalid and unenforceable as contravening the Fourteenth Amendment of the Constitution of the United States.

Dated this 8th day of June, 1959.

/s/ John B. Sanborn
John B. Sanborn
United States Circuit Judge

/s/ Jno. E. Miller
John E. Miller
United States District Judge

/s/ J. Smith Henley
J. Smith Henley
United States District Judge

[File endorsement omitted]

[fol. 50] [File endorsement omitted]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiff,

vs.

R. A. YOUNG, et al., Defendants.

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., et al., Defendants.

NOTICE OF APPEAL—Filed June 26, 1959

Notice is hereby given that plaintiffs appeal from the judgment of the Court rendered June 25, 1959, and entered . 1959.

Edwin E. Dunaway, Solicitor for Plaintiffs.

[fol. 51] [File endorsement omitted]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiffs,

vs.

R. A. YOUNG, et al., Defendants.

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiffs,

vs.

EVERETT TUCKER, JR., et al., Defendants.

DESIGNATION OF RECORD—Filed June 26, 1959

Plaintiffs designate the entire record as the record on appeal.

Edwin E. Dunaway, Solicitor for Plaintiffs.

[fol. 52]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., President, RUSSELL H. MATSON, JR., B. FRANK MACKEY, J. H. COTTRELL, JR., and TED L. LAMB, as members of the Board of Directors of the Little Rock Special School District; LITTLE ROCK SPECIAL SCHOOL DISTRICT; TERRELL E. POWELL, as Superintendent of Schools of the Little Rock Special School District; and BRUCE BENNETT, Attorney General of the State of Arkansas, Defendants.

COMPLAINT—Filed June 19, 1959

Plaintiff, Ernest T. Gephardt, for his complaint herein alleges:

I.

Plaintiff, Ernest T. Gephardt, is a resident of Pulaski County and a citizen of the State of Arkansas and of the United States. Since August, 1957, he has been employed by the defendant, Little Rock Special School District, as a teacher, holding the position of Vocational Printing Instructor at Little Rock Central High School. He is presently employed in this capacity and has performed and is performing his duties in a satisfactory manner.

Plaintiff brings this action in his own behalf, and in behalf of all other persons who by reason of their employment are similarly situated; they, and each of them, are members [fol. 53] of a class of persons whose constitutional rights are being invaded; the members of the class of persons that he represents are so numerous as to make it impractical to bring all of them before this Court; he, as a member of the class, can and will adequately and fairly represent all the

members of the class; the character of the rights and legal status sought to be declared, enforced and protected for the class is several; and there is a common question of law and fact affecting the several rights of all the class and a common relief is sought.

II.

The defendant, Little Rock Special School District, is a body corporate with power to sue and be sued in its corporate name and capacity. It is here being sued in its corporate name and capacity on its own behalf and as representing all School Districts in the State of Arkansas which are similarly situated, and which are so numerous as to make it impracticable to bring them all before the Court. All members of the class are charged with the duty of enforcing the provisions of Act 10 of the Second Extraordinary Session of the General Assembly of Arkansas, 1958. The defendant District, as a member of the class, can and will adequately and fairly represent all members of the class. There is a common question of law and fact affecting the several duties, rights and obligations of all members of the class.

The defendant corporation, Little Rock Special School [fol. 54] District, is an administrative agency and instrumentality of the State, exercising functions and performing duties under the general education laws of the State of Arkansas.

The Board of Directors of the Little Rock Special School District, as created under the laws of the State of Arkansas, is the governing body of the Little Rock Special School District, and is invested by the General Assembly with power and authority to make and enforce rules and regulations for the management and operation of the public schools within the said school district.

The defendants, Everett Tucker, Jr., B. Frank Mackey, Russell H. Matson, Jr., J. H. Cottrell, Jr., and Ted L. Lamb, are the duly qualified and acting members of the Board of Directors of the Little Rock Special School District; they, and each of them, are agents and administrative officers of the State of Arkansas and hold office and perform official

duties and functions under the general education laws of the State of Arkansas; they, and each of them, are sued in their respective official capacities.

Defendant, Terrell E. Powell, is the duly appointed, qualified and acting Superintendent of Schools of the Little Rock Special School District; is an agent and administrative officer of the State of Arkansas; and is the agent, employee and servant of the Little Rock Special School District, a [fol. 55] corporation, and holds office and performs official duties and functions pursuant to the general education laws of the State.

The defendant, Bruce Bennett, is the duly elected and qualified Attorney General of the State of Arkansas, and is being sued in his official capacity as under the statutes made and provided.

III.

The General Assembly of Arkansas at the Second Extraordinary Session of 1958 enacted Act 10, which Act was approved by Orval E. Faubus, Governor of Arkansas, on September 12, 1958, and which Act became effective and a part of the general laws of the State of Arkansas on that date. The emergency clause of said Act contained a finding by the General Assembly that the emergency enactment of this legislation was made necessary by the decisions of the United States Supreme Court concerning desegregation in the public schools.

Said Act 10 provided, among other things, that no superintendent, principal or teacher shall be employed by any school district operating a public school until, as a condition precedent to such employment, such teacher shall have filed with the governing authority of such school district an Affidavit as to the names and addresses of all incorporated and/or unincorporated associations or organizations of which such teacher is or has been a member within the past five years.

[fol. 56] On or about April 3, 1959, defendant, Terrell E. Powell, acting pursuant to the provisions of said Act 10, caused a Memorandum dated April 3, 1959, to be distributed to all certified personnel of the Little Rock Public School System, including plaintiff. Said Memorandum contained

a copy of Act 10 and stated, in substance, that the Little Rock School Board could not issue new contracts of employment *for the 1959-1960 school year to certified personnel* of the Little Rock Special School District who did not execute the Affidavits required by Act 10. A form of Affidavit was attached to said Memorandum with a request that said form be executed and filed by all teachers with the principals of their respective schools not later than 11:00 A. M., April 14, 1959.

On April 7, 1959, the plaintiff executed an Affidavit in which he stated that to his knowledge he had never belonged to nor is he now a member of any subversive organization. He further stated that the other information requested is personal and that he felt that the release of such information is unconstitutional. A copy of said Affidavit is attached hereto as Exhibit "A" and made a part of this Complaint.

On May 4, 1959, plaintiff executed an additional Affidavit which was delivered to Ben D. Rowland, Sr., then secretary of the Board of Directors of the Little Rock Special School [fol. 57] District, prior to the scheduled meeting of the Board on May 5, 1959, at which time the Board was scheduled to consider the matter of contract renewals for teachers of the Little Rock Special School District. In said additional Affidavit, plaintiff listed his membership in the Arkansas Education Association and the American Legion. He further stated his willingness to answer any question which the school authorities might constitutionally ask in regard to any matter touching upon his qualifications to continue as a teacher in the Little Rock Public School System. Since no question had been raised as to his performance of duties as a teacher or as to any association or activity of his which the Board might consider to adversely affect his position as a teacher, plaintiff refused to list any other memberships or contributions which he might have made on the ground that such requirement was in violation of his constitutional rights. A copy of said additional Affidavit is attached hereto as Exhibit "B" and made a part of this Complaint. Attached hereto as Exhibit "C" is a copy of plaintiff's letter of transmittal of the said addi-

tional Affidavit of May 4, 1959, addressed to Mr. Ben Rowland, as secretary of the Little Rock School Board.

Plaintiff declined to furnish any information other than that contained in the aforesaid Affidavits for the reason that the additional information required under the provisions of Act 10 is constitutionally beyond the competence [fol. 58] of the State of Arkansas to inquire into, and the requirement of furnishing such information as a condition precedent to continued employment as a teacher infringed upon his constitutional rights, freely to associate with others in the exercise of their privileges of freedom of religion, free speech, free press and free assembly under the Fourteenth Amendment to the Constitution of the United States; and infringed upon his rights of free and independent pursuit of happiness, of peaceable assembly to consult for the common good, of free communication of thoughts and opinions, and freedom of conscience, under the provisions of Article 2, Sections 2, 4, 6 and 24 of the Constitution of Arkansas.

For many years the custom and usage of the defendant Board of Directors, and others similarly situated, has been to enter into contracts with teachers for a period of each school year, beginning in the fall and ending in the spring of the following year. Contracts of employment for the ensuing school year have been routinely offered to teachers currently in the employ of the district in the absence of timely notice to the contrary.

On May 5, 1959, a meeting of the defendant Board of Directors was held to consider teacher contract renewals. At said meeting defendant Powell submitted a list of teachers recommended for re-employment. The names of plaintiff and other teachers who had not filed the Affidavit re- [fol. 59] quired by Act 10 were not on said "recommended" list, but were submitted for consideration by the Superintendent on a separate list, without recommendation. Plaintiff was not recommended for re-employment solely because of the provision of Act 10 forbidding the Board to renew his contract if the aforesaid Affidavit was not filed.

Because of the absence of a quorum, which developed when three of the six board members withdrew from the meeting, the Board of Directors took no legal action in re-

gard to teacher contracts for the school year 1959-1960. At the time of said meeting and at all times thereafter until June 8, 1959, enforcement of Act 10 by any school governing body in the State was enjoined by order of the United States District Court, Western Division, Eastern District of Arkansas.

The 1958-1959 school term for which plaintiff had been employed ended on May 28, 1959. The defendant Board of Directors did not during this time, nor within ten days after termination of said term, notify plaintiff that his contract would not be renewed for the next succeeding school year, as required by the provisions of Arkansas Statutes (1947) Section 80-1304, as amended by Act 455 of the Acts of the General Assembly of Arkansas, 1959. By operation of said laws plaintiff's contract of employment was automatically renewed for the school year 1959-1960.

At a meeting of the defendant Board of Directors, held [fol. 60] on June 15, 1959, a resolution was adopted setting June 25, 1959 as the deadline for filing the aforesaid Affidavits required by Act 10. Plaintiff and others have been informed by the defendant Powell, acting pursuant to said resolution, that their contracts of employment for the school year 1959-1960 will be cancelled by said Board of Directors on that date if Affidavits are not filed by June 25, 1959, on the ground that their employment as teachers is prohibited by said Act.

Plaintiff alleges upon information and belief that pursuant to the requirements of the aforesaid Act 10, members of the teaching profession similarly situated have filed said Affidavits under duress or will be compelled to do so in order to continue their employment as teachers.

Unless restrained by this Court, defendant Board will on June 25, 1959, cancel plaintiff's contract of employment, and said Board and other governing school bodies will refuse contracts or cancel existing contracts of employment of teachers for the school year 1959-1960, and for ensuing school years if said teachers have not executed the aforesaid Affidavit, such refusal or cancellation to be based solely on the ground that their employment as teachers is prohibited by said Act 10.

Information which said Act 10 requires to be filed in the aforesaid Affidavit as a condition precedent to further [fol. 61] employment is not appropriate or relevant to a determination of the qualification for continued employment as teachers, or suitability for employment of those who apply for such employment, under standards which the State of Arkansas may constitutionally impose. The purpose of said Act 10 is not to obtain information appropriate or relevant under any such permissible standard, but rather the Act is designed to intimidate plaintiff and other teachers and to coerce them into not exercising their rights under the State and Federal Constitutions as heretofore alleged. Publication of the information required to be filed will result in the harassment not only of plaintiff and other teachers, but of school authorities as well, who permit the exercise of any currently unpopular constitutional right. Plans for such use of said information have already been made by certain extremist groups, as shown by the statements of one Amis Guthridge, as quoted in the Arkansas Gazette, copies of which statements are attached hereto as Exhibits "D" and "E" and made a part of this Complaint.

Said Act as it is sought to be applied to the plaintiff, and others similarly situated, in requiring the filing of the aforesaid Affidavit as a condition of employment in the teaching profession by the State of Arkansas, or its instrumentalities, is violative of the Fourteenth Amendment [fol. 62] to the Constitution of the United States in that it deprives them of liberty and property without due process of law, denies them the equal protection of the laws, infringes upon their rights of freedom of speech, freedom of the press, freedom of assembly and association and to petition for redress of grievances, and denies them privileges and immunities of citizens of the United States.

Act 10 is unconstitutional under Article 2 of the Constitution of the State of Arkansas in that the purposes and effects of the said Act are to prevent plaintiff and other teachers from exercising rights guaranteed to them under said Article, to-wit:

> The right of acquiring, possessing and protecting property and reputation and pursuing their own happi-

ness, Section 2; The right of equality of all persons before the law, Section 3; The right peaceably to assemble to consult for the common good and to petition by address or remonstrance, the government, Section 4; The right to free communication of thoughts and opinions, and the right freely to write and publish one's sentiments, Section 6; The right not to be deprived of life, liberty or property without due process of law, Section 8; The right to have the same privileges and immunities as any other citizen or class of citizens, Section 18; and The right of conscience, Section 24.

[fol. 63] Act 10 is unconstitutional under the provisions of Article 6, Section 19, of the Constitution of Arkansas, in that the subject matter of said Act was not within the puryiew of the Governor's Proclamation calling the Second Extraordinary Session of the General Assembly of 1958.

Unless enjoined by order of this Court, the acts complained of will occur and continue to occur. Plaintiff and others similarly situated are threatened with great, immediate and irreparable injury and have no adequate remedy at law.

Wherefore, plaintiff prays the Court:

1. That a temporary restraining order be entered restraining the defendants, and all others similarly situated, pending hearing and final determination of the cause on the merits, from the enforcement, operation or execution of said Act 10 and from interfering in any way with plaintiff's employment by reason of his failure to execute and file the Affidavit required by said Act.

2. That the Court enter a declaratory judgment that said Act 10 is unconstitutional and void.

3. That the Court then enter a permanent injunction restraining the defendants, and all others similarly situated, from the enforcement, operation or execution of said Act 10 in any manner.

4. That all Affidavits already filed pursuant to Act 10 [fol. 64] be returned to the affiants and that all record of said Affidavits be cancelled and expunged.

5. That the Court grant such other or different relief in the premises as may be equitable and proper.

Edwin E. Dunaway, Solicitof for Plaintiff.

Duly sworn to by Ernest T. Gephardt, jurat omitted in printing.

[fol. 65]

EXHIBIT "A" TO COMPLAINT

AFFIDAVIT

(Certified Personnel—Little Rock School District)

STATE OF ARKANSAS
COUNTY OF PULASKI

I, Ernest T. Gephardt, being an applicant for the position of Vocational Printer at Central High School, being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others: (names and addresses of organizations)

I have never belonged to, or am now, a member of any subversive organization; to my knowledge.

I swore to this before entering the U. S. Navy and am doing so now.

The other information requested is personal and I feel it is unconstitutional to have to release this information.

and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others: (names and addresses of organizations)

/s/ Ernest T. Gephardt
Signature of Affiant

Subscribed and sworn to before me this 7th day of April, 1959

Earnestine Opie, Notary Public
Signature and Title of Official

[fol. 66]

EXHIBIT "C" TO COMPLAINT

May 4, 1959

Mr. Ben Rowland
Secretary
Little Rock School Board
Rector Building
Little Rock, Arkansas

Dear Mr. Rowland:

I understand that the Little Rock School Board will consider, tomorrow, the renewal of teacher contracts for the ensuing year.

Enclosed is an additional Affidavit to the one which I executed in response to a request by Mr. Terrell E. Powell, Superintendent of Schools, in a Memorandum dated April 3, 1959.

In addition to delivering to you this Affidavit, I would like to reiterate in this letter my willingness to answer any question which the school authorities might have to ask on any subject which is relevant to my capacity to continue as a teacher in the Little Rock Public School System.

Yours very truly,

Ernest T. Gephardt

ETG:
encl

CLERK'S NOTE

(Exhibits "D" and "E", having been previously incorporated into the transcript, are omitted at this point to avoid duplication)

[File endorsement omitted]

[fol. 67]

EXHIBIT "B" TO COMPLAINT

AFFIDAVIT

STATE OF ARKANSAS)
: ss
COUNTY OF PULASKI)

I, Ernest T. Gephardt, Vocational Printer at Central High School, Little Rock, Arkansas, being first duly sworn, do hereby make this Affidavit in addition to the one which I have heretofore filed.

I am a member of the Arkansas Education Association and the American Legion.

I will be glad to answer any question which the school authorities may constitutionally ask me in regard to any matter touching upon my qualifications to continue as a teacher in the Little Rock Public School System.

Since no question has been raised as to my performance of duties or as to any association which might adversely affect my position as a teacher, I respectfully refuse to list any other memberships or contributions on the ground that such requirement is a violation of my rights under the Arkansas and United States Constitutions.

.....

Subscribed and sworn to before me this . . day of May, 1959.

.....
Notary Public

My commission expires:

.....

[fol. 68]

NOTE RE SUMMONS AND SHERIFF'S RETURN

The Return of the Sheriff of Pulaski County, Arkansas, dated June 19th, 1959, shows service of summons upon Everett Tucker, Jr., President; Russell H. Matson, Jr.; B. Frank Mackey; J. H. Cottrell, Jr.; and Ted L. Lamb, as members of the Board of Directors of the Little Rock Special District, by serving each one in person.

The Little Rock Special School District by serving Terrell E. Powell, as Superintendent of Schools of the Little Rock Special School District; and Bruce Bennett, Attorney General of Arkansas, in person.

[fol. 69]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112877

[Title omitted]

MOTION TO DISMISS—Filed June 24, 1959

Comes Bruce Bennett, Attorney General of the State of Arkansas, pro se, and moves the court to dismiss this suit against this defendant for the reason that:

I.

The Attorney General of the State of Arkansas is not a proper party, nor a real party in interest to this action.

II.

The Attorney General of the State of Arkansas is not properly a nominal defendant, or otherwise a party to this suit, under the laws of the State of Arkansas.

III.

None of the relief requested by the plaintiffs would be effected by a judgment against this defendant.

[fol. 70]

IV.

Under the provisions of Ark. Stats. (1947) 34-2510, the Attorney General of the State of Arkansas is entitled to be heard in any proceeding where a statute, ordinance or franchise is alleged to be constitutional, but may not, under the authority of this statute, be made a party defendant to such proceeding.

Wherefore, the defendant Bruce Bennett, Attorney General of the State of Arkansas, prays this court to dismiss

the complaint filed herein as to him, for costs and all other proper relief; further reserving under this motion, the right to be heard in this proceeding as conferred by Ark. Stats. (1947) 34-2510.

Bruce Bennett, Attorney General, State of Arkansas, pro se.

[File endorsement omitted]

[fol. 71]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112877

[Title omitted]

SEPARATE ANSWER OF DEFENDANTS EVERETT TUCKER, JR., PRESIDENT, RUSSELL H. MATSON, JR., B. FRANK MACKEY, J. H. COTTRELL, JR., AND TED L. LAMB, AS MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK SPECIAL SCHOOL DISTRICT; LITTLE ROCK SPECIAL SCHOOL DISTRICT; AND TERRELL E. POWELL, AS SUPERINTENDENT OF SCHOOLS OF THE LITTLE ROCK SPECIAL SCHOOL DISTRICT—Filed June 25, 1959

Come defendants above named and for their separate answer to the Complaint of the plaintiff filed herein state:

I.

That they specifically and separately deny each and every material allegation of the Complaint.

2.

Further answering these defendants state that Act 10 of the Second Extraordinary Session of the General Assembly of Arkansas, 1958, is a valid exercise of legislative power as measured against the provisions of the Constitution of the United States and of the Constitution of the State of Arkansas.

Wherefore, these defendants pray that the Complaint of the plaintiff filed herein be dismissed, that defendants have

judgment for their cost herein expended, and all other [fol. 72] proper relief.

Mehaffy, Smith & Williams, By Herschel H. Friday, Jr. and Robert V. Light, Attorneys for the above-named defendants.

[File endorsement omitted]

[fol. 73] [File endorsement omitted]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiff,

vs.

R. A. YOUNG, et al., Defendants.

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., et al., Defendants.

NOTICE OF APPEAL—Filed June 26, 1959

Notice is hereby given that plaintiffs appeal from the judgment of the Court rendered June 25, 1959, and entered , 1959.

Edwin E. Dunaway, Solicitors for Plaintiffs.

(Copy of Notice of Appeal was forwarded to Bruce Bennett and Mehaffy, Smith & Williams by Chancery Clerk, June 26, 1959)

[fol. 74] [File endorsement omitted]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiff,

vs.

R. A. YOUNG, et al., Defendants.

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., et al., Defendants.

DESIGNATION OF RECORD—Filed June 26, 1959

Plaintiffs designate the entire record as the record on appeal.

Edwin E. Dunaway, Solicitor for Plaintiffs.

[fol. 75]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiff,

vs.

R. A. YOUNG, JR., et al., Defendants.

and

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., et al., Defendants.

DECREE

On June 25, 1959, the above causes came on for hearing, having been consolidated for hearing by order of the court on agreement of the parties; plaintiffs, Max Carr and Ernest T. Gephardt, appearing in person and by their solicitor, Edwin E. Dunaway; defendants, Board of Trustees of the University of Arkansas, appearing by their solicitors, Bruce Bennett, Attorney General of the State of Arkansas, Bill J. Davis and Ben Harrison; and Board of Directors of the Little Rock School District, appearing by its solicitors, Mehaffy, Smith and Williams, Herschel Friday and Robert Light; and the same being submitted upon the complaints of the plaintiffs, the proof of service on all defendants, the answers of defendants, and the testimony

of the plaintiffs and other witnesses taken ore tenus at the bar of the court. And the court being well and sufficiently [fol. 76] advised as to all matters of law and fact arising herein, doth find:

I.

The plaintiff, Max Carr, is not a representative of all school teachers nor of all members of the teaching profession of the State of Arkansas. That plaintiff, Max Carr, is a representative of the class of the teaching profession of the University of Arkansas and other State supported institutions of higher learning.

II.

Defendant, University of Arkansas Board of Trustees, is not a representative of all the governing boards of public schools and educational institutions in the State of Arkansas, it being only a member of the class composed of the State supported institutions of higher learning.

III.

Plaintiff, Max Carr, has refused to sign the affidavit as required by Act 10 of the Second Extraordinary Session of the Sixty-First General Assembly of the State of Arkansas.

IV.

Plaintiff, Ernest T. Gephardt, has refused to sign the affidavit as required by Act 10 of the Second Extraordinary [fol. 77] Session of the Sixty-First General Assembly of the State of Arkansas.

V.

Act 10 of the Second Extraordinary Session of the Sixty-First General Assembly of the State of Arkansas does not violate Article 6, Section 19 of the Constitution of the State of Arkansas in that Act 10 is within the purview of the Governor's proclamation calling the Second Extraordinary Session of the Sixty-First General Assembly. Act 10 does

not violate the provisions of Article 2, Sections 2, 3, 4, 6, 8, 18 and 24 of the Constitution of the State of Arkansas. Act 10 does not violate any provision of the Constitution of the United States.

It Is, Therefore, by the Court Considered, Ordered, Adjudged and Decreed:

1. That over the objections of the plaintiffs, the motions to dismiss filed herein by Honorable Bruce Bennett, Attorney General of the State of Arkansas, are granted.

2. That the complaints seeking declaratory and injunctive relief with respect to Act 10 of the Second Extraordinary Session of the Sixty-First General Assembly of the State of Arkansas, are without merit and are dismissed with prejudice, to which action of the court plaintiffs duly objected and their objections are noted of record.

[fol. 78] 3. That Act 10 of the Second Extraordinary Session of the Sixty-First General Assembly of the State of Arkansas is constitutional. To all of which findings and rulings of the court plaintiffs duly objected and their objections are noted of record.

Entered nunc pro tunc, this 22 day of September, 1959, as of June 25, 1959.

Murray O. Reed, Chancellor.

[fol. 79]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiffs,

vs.

R. A. YOUNG, et al., Defendants.

and

No. 112877

ERNEST T. GEPHARDT, for himself and others similarly situated, Plaintiffs,

vs.

EVERETT TUCKER, JR., et al., Defendants.

TRANSCRIPT OF TESTIMONY

Testimony taken ore tenus at the bar of the Court, June 25, 1959.

APPEARANCES

For Plaintiffs, Honorable Edwin E. Dunaway.

For Defendants, Honorable Bruce Bennett, Honorable Ben Harrison, Honorable Bill Davis, Honorable Herschel Friday, Honorable Robert Light.

[fol. 80] June 25, 1959.

Mr. Dunaway: If the Court please, since there has been no formal order, I think probably the record should reflect that by agreement of the parties, these two suits were consolidated.

The Court: I assume there is no objection?

Mr. Bennett: No, sir.

The Court: Let the order be entered, if necessary, at the proper time, consolidating both actions for trial.

MAX CARR, the plaintiff, and a witness in his own behalf, affirms, as follows:

Direct examination.

By Mr. Dunaway:

Q. State your name, please.
A. Max Carr.
Q. Where do you live, Mr. Carr?
A. West Fork, Arkansas.
[fol. 81] Q. And you are presently employed at the University of Arkansas as an Associate Professor of Music?
A. Yes, sir.
Q. How long have you been at the University?
A. Since the Fall of 1955.
Q. Has any question ever been raised by any member of the University Administration as to your qualifications to continue teaching, other than on the basis of refusing to execute the affidavit required by Act 10?
A. Not to my knowledge.
Q. As a matter of fact, haven't they urged you to sign Act 10 and stay on?
A. Some.
Q. I will ask you if you executed this affidavit?
A. Yes.
Q. Will you read it, please.
A. (Reading) "I, Max Carr, holding the position of Associate Professor of Music at the University of Arkansas, being conscientiously opposed to taking an oath or swearing in any form, do solemnly and truly declare and affirm:

"I am now or have been within the past five years a member of the following organizations: Arkansas State Music Teachers Association, Music Teachers National As-[fol. 82] sociation, and the American Association of University Professors.

"I am not now, nor have I ever been, to my knowledge, a member of any subversive organization.

"I will gladly answer any question which the authorities of the University may constitutionally ask me in regard to any matter, including my associations and activities, touch-

ing upon my qualifications to continue as a teacher in the State of Arkansas.

"Since no question has been raised as to my performance of duties or as to my associations or activities which might adversely affect my position as a teacher, I respectfully refuse to list any other memberships or contributions on the ground that such requirement is a violation of my rights under the Arkansas and United States Constitutions." I signed that on the 10th day of June, 1959.

Q. Has any question been raised in regard to any association of yours, or any of your activities, which might disqualify you, by any authorities at the University?

A. No.

Q. I believe you were notified of a dead line for filing and the Federal Court suit was pending and during that period conditional contracts were executed, is that correct?

A. That is correct.

Q. Is this (indicating) a copy of the contract?

[fol. 83] A. This is a copy of the contract for the 1959-60 academic year.

OFFER IN EVIDENCE

Mr. Dunaway: I would like to introduce this in evidence as Exhibit 1 to the plaintiff's testimony.

The Court: Let it be introduced.

(Thereupon, said instrument was marked for identification as Exhibit No. 1 and received in evidence.)

(Mr. Dunaway read Exhibit No. 1 to the Court.)

By Mr. Dunaway:

Q. Mr. Carr, you had been informed, in accordance with that condition in your contract, that at a date to be fixed by the University Administration, either you will sign an affidavit or this conditional contract will be terminated, in accordance with the provisions of Act 10?

A. What was the first part of your question?

Q. Have you been informed that the contract would be canceled if you do not file an affidavit?

A. Yes.

Mr. Dunaway: I believe that is all.

Cross examination.

By Mr. Bennett:

[fol. 84] Q. Mr. Carr, I believe you file a federal income tax return, do you not?

A. Yes, sir.

Q. And you file a state income tax return?

A. Yes, sir.

Q. And when you donate to various organizations—

Mr. Dunaway: I object to this line of questioning, Your Honor. It has nothing to do with the constitutionality of this statute.

The Court: I have not heard the question yet. Do not answer the question until he completes it.

By Mr. Bennett:

Q. When you file your income tax statements, if you have a legal deduction, or deductions, you list them for the Federal Government, don't you?

The Court: Does that complete the question that he is objecting to?

Mr. Bennett: The question basically is you do furnish information to other governmental agencies, such as is required in Act 10, don't you?

[fol. 85] The Witness: Yes, I do.

The Court: Is that what you object to?

Mr. Dunaway: I object to it as being irrelevant and my objection is mainly not to have the record cluttered up. If he is going to pursue that line, I would like to ask that the Attorney General specifically ask what information and not just information like in Act 10, because there is all kinds of information, part of which may or may not be furnished in other places.

Mr. Bennett: The question, I think, is self-explanatory.

The Court: You didn't ask for any detail?

Mr. Bennett: No, sir.

The Court: You asked the question if he did not furnish the same information as is required in Act 10?

Mr. Bennett: I can rephrase the question and put it in the actual language in Act 10.

[fol. 86] Q. In your filing of certain papers with other Governmental Agencies, such as filing your State and Federal Income Tax Returns, do you furnish other Governmental Agencies, other than the University of Arkansas, information as to the names and addresses of incorporated or unincorporated associations that you might donate money to?

A. If I request deductions, I do.

The Court: I don't think it is material, General, but I will let him answer it for the record.

By Mr. Bennett:

Q. In other words, donations to your Church, if you claim that as a deduction on your income tax, you list that Church and how much you donated to it?

Mr. Dunaway: The witness has already said if he was claiming a deduction, he listed it. I don't think it is necessary for the Attorney General to make a speech to the witness.

By Mr. Bennett:

Q. Mr. Carr, you understand that the affidavit called for under Act 10 has been held to be confidential to the Board of Trustees of the University of Arkansas—Board of Trust of the University?

[fol. 87] Mr. Dunaway: If the Court please, before I make my objection and before the question is answered, I would like to see a copy of the Attorney General's ruling on that matter, because it was not my understanding that the ruling was what he is here stating.

Mr. Bennett: With the Court's permission, I will introduce the ruling and read the part which I think is pertinent to the Court.

The Court: Let Mr. Dunaway examine it if he cares to object to it.

By Mr. Bennett:

Q. Mr. Carr, did you have knowledge that the University of Arkansas Board of Trust had stated that the information requested in Act 10 on your affidavit would be treated as confidential by the University of Arkansas Board of Trust?

A. Yes, sir.

The Court: Do you want to introduce that?

OFFER IN EVIDENCE

Mr. Bennett: If the Court please, I would like to introduce as an Exhibit to Mr. Carr's testimony, a letter from [fol. 88] the Attorney General of Arkansas to Mr. Ben T. Rowland, dated April 21, 1959.

The Court: Let it be introduced.

(Thereupon, said opinion was marked for identification as Exhibit No. 2 and received in evidence.)

Mr. Bennett: The last paragraph of which I would like to read into the record:

"As the School Boards of this State and the Boards of Trust of the University and State Colleges are composed of responsible men and women and Ark. Stats. (1947) 6-604 provides that they may meet in executive session, I am of the opinion that the affidavits that are required by Act 10 should be used solely within the letter of the law as recited in Act 10 and it is an administrative determination, to be made by the respective Boards, as to the disclosure of information contained in the affidavits."

Q. Now, as a result of that opinion, Mr. Carr, was it announced up there in the University Paper, The Razorback, that the information contained in Act 10 would be treated as confidential by the Board of Trust?

A. That's correct.

[fol. 89] Q. And you knew that any information that you disclosed by Act 10 was to be treated as confidential by your employers, the Board of Trust?

A. That is correct as stated.

Q. Now, Mr. Carr, can you tell this Court, with that information being treated as confidential, that would be contained in your affidavit, how it would in any wise affect your reputation?

Mr. Dunaway: I would like to object to the question, if the Court please, for this reason: In the first place, I do not think it is proper to ask a lay witness to attempt to interrupt an Attorney General's opinion, but in the concluding statement, it stated that it is an administrative determination to be made by the respective Boards as to the disclosure.

In other words, the Attorney General has, in effect, advised each school board in the state that they may, if they want to, keep this confidential, or they may disclose it. There is no certainty that a board that today says it will be confidential will say that tomorrow. It is entirely an improper line of questioning to this witness.

The Court: Repeat your last question.

Mr. Bennett: Having knowledge that the University of [fol. 90] Arkansas Board of Trust was to treat the information you gave them under Act 10 as confidential, can you tell this Court how that information that you had given the Board of Trust, locked up by the Board of Trust, could in any wise impair your reputation.

The Court: I think the objection should be sustained.

Mr. Bennett: The reason I asked the question is that in their complaint they are alleging that Act 10 violates certain portions of the Arkansas Constitution, among which is that every man has a right to protect his reputation. Now, they say this impairs his reputation.

The Court: This witness, I don't think, could say how, when or whether he considers that would affect his reputation.

Mr. Bennett: I asked the question trying to find out how he reached any conclusion that giving this information which was locked up would hurt his reputation.

The Court: Assuming that it would be locked up and would continue to be locked up, which he has no assurance to.

[fol. 91] Mr. Bennett: He testified under oath it had come to his information that the information would be.

The Court: You mean basing it on that assumption, that it is locked and would remain locked, how it would affect his reputation?

Mr. Bennett: The Board of Trust announced they would lock it up. I will pass on to the next question.

Q. I am asking these questions just to make the record. Mr. Carr, since Act 10 was passed, has it had any restraint upon the free communication of your thoughts and opinions?

A. No, it has not.

Q. Is it your understanding that if you file this affidavit called for by Act 10, that under no circumstances will the information contained therein automatically discharge you?

A. Would you please restate that question.

Q. Is it your understanding that Act 10, the information called for therein, and if you filed same, nothing contained in your affidavit would automatically discharge you?

Mr. Dunaway: If the Court please, the Attorney General is again asking a lay witness what is the legal effect [fol. 92] of not complying with Act 10, which is a question for the Court to decide.

The Court: I don't think that is material here at all.

Mr. Bennett: All right, sir.

Q. Have you been notified that you can file this affidavit and affirm the contents therein rather than swear to it, in line with your religious scruples in that respect?

A. Yes, sir.

Q. Mr. Carr, have you communicated with anyone in regard to another position, other than at the University?

A. Do you mean, sir, any specific school?

Q. Anyone.

A. Or is that a general sort of question?

Q. Anyone.

A. As a result of Act 10, I have communicated with the Teachers' Placement Agency—is that what you mean?

Q. As a matter of fact, you do not intend to stay at the University this Fall?

A. That depends on what happens to Act 10, the affidavit.

Mr. Bennett: I believe that is all.

Redirect examination.

[fol. 93] By Mr. Dunaway:

Q. Mr. Carr, unless fired, you do intend to stay at the University?

A. I would assume so, yes.

Q. And you do intend to pursue your legal rights to fight for your job there at the University?

A. I do.

Q. Mr. Bennett asked you whether Act 10 had acted as a restraint on your opinions and your conscience. You have not signed Act 10, is that correct?

A. That is correct.

Q. The affidavit?

A. That is correct.

Recross examination.

By Mr. Bennett:

Q. Mr. Carr, you believe in complying with the laws of the State of Arkansas, don't you?

A. I believe in complying with it—where it doesn't conflict with the higher loyalty, I do.

Q. With the higher loyalty?

A. Yes, sir.

Q. What do you mean by conflict with higher loyalty?

A. I think what I mean there is what we have assumed as part of freedom in this country and that a man's con-[fol. 94] science or religious faith is higher than his loyalty to his state. At the same time, I would say that when a man is acting in such a manner toward what he might call his highest loyalty, he is acting in the best loyalty he can to the state.

Q. In other words, if a state statute or a federal statute didn't agree with what you termed to be your conscience, you don't believe that you should comply with that law?

A. I would, as we are doing now, attempt legal procedures.

Q. Which is proper?

A. Which is proper.

Q. All right.

Mr. Dunaway: That seems to me to be an irrelevant line of questioning. The witness has stated if he doesn't believe in the law, he believes it is right to test it out and I do not see the purpose in pursuing the questioning any further.

By Mr. Bennett:

Q. What I want to ask is this: If Act 10 should be held to be valid in the state courts, just like it is in the federal courts, do you still think that your conscience would dictate to you over and above what the law is?

A. I'm sorry, I don't follow it.

Q. If Act 10 should be held valid.

A. Yes.

Q. In state courts just as it is or has been held in fed-
[fol. 95] eral court, do you believe that your interpretation of what your conscience dictates should override the law of the land?

Mr. Dunaway: If the Court please, if you are going to permit the witness to answer that, the Attorney General should be more specific and ask him whether he intends to obey it or whether he intends to move on.

The Court: I think that is the proper way to put it. In other words, what you are trying to ask him is whether or not he would follow his conscience and resign, rather than comply with the law. Is that what you are getting at?

Mr. Bennett: Whether or not the plaintiff thinks that he should have the right to lay down the ground rules about what the law is that he is going to comply with.

The Court: Well, what he thinks about that, I don't think would be material.

By Mr. Bennett:

Q. Let me ask you this: If Act 10 is held to be valid, will you tell this Court that you will comply with Act 10?

A. No, sir, I will not.

Q. You will resign?

[fol. 96] A. I will not comply with Act 10.

Q. And you know Act 10 makes it mandatory on the part of the Board of Trust not to renew your contract provided you don't comply with it?

A. That is the rule, yes, sir.

By Mr. Dunaway:

Q. And in the event Act 10 is held valid and your conscience doesn't permit you, you will move on to a place where they don't have an Act 10, is that what you are saying?

A. Yes, sir.

Q. Are you telling the Attorney General that you will violate the law of Arkansas when it is determined by the highest court to be valid?

Mr. Bennett: Ask for an affirmative question and call for an affirmative answer.

The Court: Are you telling what?

By Mr. Dunaway:

Q. Tell the—are you telling the Attorney General that you will violate the law of Arkansas when it is determined by the highest court to be valid?

The Court: He can answer that.

By Mr. Dunaway:

[fol. 97] Q. Are you telling the Attorney General that you will violate the laws of Arkansas, particularly Act 10, if it is ultimately held to be valid?

A. I cannot violate it, can I. Either I comply or I do not comply, but non-compliance would not be violation.

The Court: I think he said he wouldn't comply, he would just move on.

Mr. Bennett: I anticipate they are going into the legislative intent behind Act 10 and since Mr. Carr is already on the stand, I would like to question along that line, trying to bring out why Act 10 might be—might have been passed.

Mr. Dunaway: If the Court please, if the Attorney General can show that Mr. Carr was consulted and was a mov-

ing force in the enactment of Act 10, or that there was any information as to Mr. Carr's views, although I think it is improper, I would not object.

Mr. Bennett: I don't want to be disagreeable in the matter, however, I think it is proper to ask Mr. Carr if he doesn't believe that our government is founded on the law as passed by the legislature and congress, rather than the [fol. 98] law of each individual conscience.

Mr. Dunaway: I object.

The Court: That is not material or a proper line of questioning, I don't think. It has nothing to do with his knowledge of the intent of the legislature. I don't think that is a proper question unless you insist on putting it in for the record. I will let it in for the record if you insist, but I do not think it is material to the case.

Mr. Bennett: I believe that is all.

(Witness excused.)

[fol. 99] JOHN CALDWELL, a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunaway:

Q. You are Dr. John Caldwell, President of the University of Arkansas?

A. I am.

Q. And you are here today in response to a subpoena which the plaintiffs had issued for your presence here today to testify?

A. I am.

Q. Do you know the plaintiff, Max Carr?

A. I do.

Q. Would you tell the Court, other than his refusal to execute the full affidavit as required by Act 10, there is any reason why he would be dismissed from the University?

A. There is none.

Q. His performance of duties in every way that you and

the other members of the administration know of, has been entirely satisfactory?

A. Yes.

Q. I believe some of you have urged him to stay on?

A. Yes.

[fol. 100] Q. I believe you were in the court room when this contract was read?

A. Yes.

Q. I wish you would tell the court briefly exactly the situation as to all contracts at the University and how this happened to be done in that way at that time.

A. When the Board of Trustees finally approves the budget for the University, or any portion of the University, and the Administrative Officers are authorized to proceed with offering appointments for the succeeding year, the administration does make an offer of those appointments. This year, the appointments were offered sometime around April 20, I believe, and in our customary fashion, we set a date, May 15, for the appointment to be returned signed by the employee. In this particular case, we indicated, of course, that the appointments returned would have to be accompanied or, as a matter of fact, before we issued the appointments, we required to be placed in the hands of the Secretary of the Board of Trustees, who signs all appointments, the affidavit required by Act 10. Before all of these were in to the Board of Trustees, a Federal Court stay was levied against a party in a suit and to all similarly situated. The University Board of Trustees and the Administrative Officers, therefore, were stayed from applying [fol. 101] or requiring the affidavit. This was around May 3rd. Therefore, while we had already received some 300 or 350 of these affidavits from approximately 500 members who would come under the terms of the Act, we then determined that in order to clarify the appointment situation as nearly as possible and yet stay solidly within the terms of both Act 10 and the stay of the Court, that we would issue conditional appointments and we did, therefore, have printed on these appointments which we sent out between May 3rd and, well, all appointments that have been made since then, this clause added to the previous appointments,

which reads; . . . "subject to tenure regulations, and subject to the condition that should legal procedures preventing the Board of Trustees of the University of Arkansas from enforcing Act 10 of the Extraordinary Session of 1958 be terminated in any manner, you will then comply with that Act by filing the required affidavit thereunder on or before a date then set by the University." We issued those conditional contracts as a matter of interpretation to the faculty and in a faculty meeting we made it very clear to them what this meant was that if the stay was removed and if at any time Act 10 was upheld and therefore renewed to its full force and effect, they would thereupon file an affidavit as required by Act 10 or forfeit their contracts.

Q. And the position of the Board, then, is that unless [fol. 102] the Court holds Act 10 invalid or a stay or temporary injunction is issued, the University Administration within a reasonable time will fix a deadline, that has not been done?

A. That has not been done because the stay has not been done because the stay has not been effectively removed in the sense an appeal was filed so quickly after the stay was removed that we waited for the judgment of this Court.

Q. What I want to get straight is that within some reasonable time, either the plaintiff, Carr, and other members of the University faculty who have indicated that they will refuse to sign the affidavit, their conditional contracts will be canceled if they don't execute the affidavit?

A. And if Act 10 is upheld, the answer is yes.

Q. The point I was trying to make or to clarify is that it is not the University's position that these conditional contracts will continue indefinitely pending appeal to the United States Supreme Court, if necessary?

A. No, indeed.

Q. Dr. Caldwell, I believe the University for years has had some procedures for examining the qualifications of prospective teachers and employees, is that right?

A. It has.

Q. Do you know of any school bodies, or teachers, or [fol. 103] teachers' associations, or administrative heads of schools that sought the enactment of Act 10?

A. No.

Mr. Dunaway: I believe that is all.

Cross examination.

By Mr. Bennett:

Q. You have complied with Act 10 and filed your affidavit, of course?

A. Yes, sir.

Q. Did the Board of Trust of the University order these affidavits filed to be held as confidential?

A. Yes.

Q. And you have held every affidavit that has been filed as confidential information secured in executive session?

A. Yes, the affidavits are filed in a locked file in the office of the secretary of the Board of Trustees.

Q. I believe you have been notified and you so notified the plaintiff in this case that he could file his affidavit and affirm it, rather than swear to it?

A. Yes, sir.

Q. What is the policy of the University on enforcing the provisions of Act 10? I believe you have already answered that in response to one of Mr. Dunaway's questions.

[fol. 104] A. We have been enforcing it since the day it was passed and we were notified of it becoming law, September of last year.

Q. Dr. Caldwell, the information called for in Act 10, in addition to the other in applications for employment—I am talking about when you employ a person initially—would the information contained in Act 10 be of further value to you in screening such applicant?

A. No, sir.

Q. There is not any additional information called for in Act 10 that you don't already know, usually, about an applicant at the University of Arkansas?

Mr. Dunaway: That is not what the witness testified to.

Mr. Bennett: I can ask the other question.

Mr. Dunaway: You can ask that, but—

Mr. Bennett: Let the Court decide, Mr. Dunaway.

Mr. Dunaway: I was raising the question for the Court, but I have decided to withdraw it.

[fol. 105] Mr. Bennett: You made the statement that is not what the witness said.

The Witness: Ask it again.

By Mr. Bennett:

Q. You said this additional information would not be helpful in screening the applicant and I asked the further question that you have already screened the applicant rather thoroughly before you employed them?

A. Yes, sir.

Q. I just wanted to clarify that.

A. Yes, that is what I meant.

Q. And if Act 10 is declared to be the law, the University is going to call for that affidavit?

A. Absolutely, with no equivocation.

Mr. Bennett: That is all.

Redirect examination.

By Mr. Dunaway:

Q. Dr. Caldwell, you said that presently, under a rule of the Board of Trustees, that the information in the affidavits, or the affidavits, are under lock and key?

[fol. 106] A. Yes, sir.

Q. And that will continue so long as that is the rule of the Board of Trustees?

A. Yes, sir.

Q. If the Board of Trustees, acting under its discretion under Act 10, chooses to make them public, you will then make them public if that is what the Board orders, is that not correct?

A. If that is what the Board orders.

Q. In other words, what the Board says?

A. But the point is, these affidavits are in the hands of the Board of Trustees, not the President of the University. They are in the hands of the Secretary of the Board of

Trustees, not me. That question would have to be asked of the Secretary, Mr. Pomfrit.

Recross examination.

By Mr. Bennett:

Q. Just for the record, how many members of the Board of Trustees do you have?

A. Ten.

Q. And they are appointed for ten year terms?

A. Yes, sir.

[fol. 107] Q. Wherein one member's term expires each year?

A. Yes, sir.

Q. So, you don't have any rapid turnover completely in the Board of Trustees of the University?

A. No, sir.

The Court: Do you have any questions, Mr. Light?

Mr. Light: No, sir.

(Witness excused.)

[fol. 108]. Ernest Gephardt, the plaintiff, and a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunaway:

Q. You are Ernest Gephardt?

A. Yes, sir.

Q. Where do you live?

A. 3701 Whitfield.

Q. You are a citizen of Arkansas and the United States?

A. Yes, sir.

Q. What is your profession?

A. Vocational Printing Instructor at Central High School.

Q. How long have you had that position?

A. For two years, since August of 1957.

Q. Were you notified sometime in April that the execution of an affidavit under the provisions of Act 10 must be made by you?

A. Yes, sir and returned—I don't know the exact date.

Q. And were you informed by Mr. Terrell Powell, the Superintendent of Schools, that if that affidavit was not executed, then under the provisions of Act 10 you could not be re-employed? Or did your principal tell you?

A. That was the original form.

Q. The original form that was sent out by Mr. Powell?

[fol. 109] A. Yes, sir.

Q. Did you at that time execute an affidavit, but one which did not give all of the information required in Act 10?

A. Yes, I did.

Q. Is that a copy of it?

A. Yes.

Q. Would you read it into the record?

A. "I, Ernest T. Gephardt, being an applicant for the position of Vocational Printer at Central High School, being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others: (names and addresses of organizations)

"I have never belonged to, or am now, a member of any subversive organization; to my knowledge.

"I swore to this before entering the U. S. Navy and am doing so now.

"The other information requested is personal and I feel it is unconstitutional to have to release this information, and further that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others: (Names and addresses of organizations)."

[fol. 110] Q. Did you then later on May 4th, prior to a scheduled meeting of a Little Rock School Board, discuss matters, as alleged in your complaint and execute an additional and supplemental affidavit?

A. I did.

Q. Would you read that to the Court?

A. "I, Ernest T. Gephardt, Vocational Printer at Central High School, Little Rock, Arkansas, being first duly sworn,

do hereby make this Affidavit in addition to the one which I have heretofore filed.

"I am a member of the Arkansas Education Association and the American Legion.

"I will be glad to answer any question which the school authorities may constitutionally ask me in regard to any matter touching upon my qualifications to continue as a teacher in the Little Rock Public School System.

"Since no question has been raised as to my performance of duties or as to any association which might adversely affect my position as a teacher, I respectfully refuse to list any other memberships or contributions on the ground that such requirement is a violation of my rights under the Arkansas and United States Constitutions."

Q. And that was filed with Mr. Ben T. Rowland, who was then Secretary of the School Board, is that correct?

A. That is correct.

[fol. 111] Q. I believe you show that was not filed in the School Board Offices and last week you filed another copy of it.

A. I did.

Q. Have any of the school authorities in any way criticized your performance of duties?

A. None whatsoever.

Q. Have they urged you to go ahead and continue your teaching?

A. Yes, they have.

Q. Have they, since the filing of this affidavit, asked you any question about any organization, contribution or activity of yours?

A. No, they have not.

Mr. Light: The Little Rock School Board is very much plagued and beleaguered with the litigation and I think and I think if the Court could relieve us of one further lawsuit that would almost be inevitable in a few weeks, by ascertaining at this time what the position of the Little Rock Board will be tonight at 7:30, if Act 10 is declared by this Court as unconstitutional, or if it is declared to be constitutional. In other words, if tonight when the Little Rock Board meets and this Court has held Act 10 to be unconstitutional, we want to be able to advise the Board

whether they are bound to re-employ Mr. Gephardt, or not [fol. 112] to re-employ Mr. Gephardt and due to the reading of the teacher tenure act of Arkansas, which has been recently amended, along with Act 10, it will take a declaration of this Court to protect the Board and there is no other way to protect the Board.

With the understanding that we will file an appropriate pleading to request such a declaration, in order to keep the record straight, I would like to ask Mr. Dunaway now if he has any objection to us seeking such a declaration from the Court in the case Act 10 is declared by this Court to be unconstitutional.

Mr. Dunaway: I would be glad at the conclusion of this hearing to consider that. Believe me, I am not trying to be difficult; Your Honor, but when you without bringing in other teachers who might be affected, on this automatic renewal or non-renewal and a construction of an amendment to a law which affects every teacher, I just don't think that we are in any position to agree to make that an issue.

Mr. Bennett: It is a class action.

Mr. Dunaway: It is a class action for the purpose of declaring Act 10 unconstitutional and I am prepared to try that law suit.

[fol. 113] All I am saying is that I will not willingly go off half cocked and agree to bring another issue which I have not studied in a class action and assume to properly defend the members of the class.

Mr. Light: If that is Mr. Dunaway's position, can we confine its application to Mr. Gephardt and his contract.

Mr. Dunaway: I am standing on the pleadings as far as I am concerned and as far as Mr. Gephardt is concerned.

The Court: All right, go ahead.

Cross examination.

By Mr. Light:

Q. Mr. Gephardt, were you notified within 10 days following the termination of the school term last month that your contract would not be renewed by the Board, the School Board or one of its members? I believe the school term expired on May 28th.

A. That is correct.

Q. And then the 10th day would be about June 7 or 8, following that, is that correct?

A. That is about right.

Q. Did you receive a notice in that period from the [fol. 114] Board of Education or someone purporting to represent the Board of Education, that your contract for the 1959-60 period would not be renewed—would not be extended?

A. No.

Q. Then, you happen to know as a matter of fact that the Board of Education of the Little Rock School District was under an injunction from the Federal District Court not to enforce Act 10 during that period of time?

A. Do I know they were under an injunction?

Q. Yes.

A. Yes, I knew it.

Q. So, of course, they could not have given you such notice without filing that injunction during that 10 day period?

A. That's right.

Q. Do you intend, in the event the Board of Education extends you a new contract, offers you a new contract for the year 59-60, do you intend to sign that contract and continue in your present position in the Little Rock School System?

A. Yes.

Q. You have made no other arrangements to go and work in some other school for the year 59-60?

A. No, I have not.

Q. You have not had any communication with any other School District directed toward making that arrangement? [fol. 115] A. None whatsoever.

Q. If Act No. 10 is held by this Court to be valid, will you comply with the law and sign the affidavit as required at the present time?

A. I doubt it at the present time.

Q. Will you do it before 7:30 tonight?

A. No, I don't believe I will.

Q. You will not?

A. I don't believe I will.

Cross examination.

By Mr. Bennett:

Q. I believe on the 7th day of April you directed an affidavit to the Little Rock School Board wherein you did not furnish all of the information called for by Act 10, is that right?

A. Yes, sir, that is correct.

Q. Now, read the first part of that.

A. I, Ernest T. Gephardt, being an applicant—

Q. Stop there. You were an applicant for the job of Vocational Printer on that date, were you not?

A. For re-employment.

Q. Does it say re-employment or applicant?

A. It says applicant.

[fol. 116] Q. You were applying for the job of Vocational Printer on that date, weren't you?

A. For re-employment.

Q. But it said applicant, didn't it?

A. Yes.

Q. You were applying for a job with the Little Rock School Board on the 7th of April, weren't you?

A. Yes, I suppose so.

Q. And you knew Act 10 had been passed by the Legislature?

A. Yes, I did.

Q. You were applying and you knew as a condition precedent to being hired that the School Board was under a state statute, asking you and making you file the affidavit before they could employ you?

A. Yes, sir, I did.

Q. You didn't comply with that statute?

A. No, I did not.

Q. I am going to ask you the same question I asked Mr. Carr. Do you file certain papers with other Governmental Agencies, wherein you include information called for by Act 10, but which you refuse to file under the provisions of Act 10?

Mr. Dunaway: I object to the question as being wholly irrelevant.

The Court: I don't see that it has any bearing here.

[fol. 117] Mr. Bennett: I just wanted to find out, Your Honor, if he gives this information to other Governmental Agencies and won't give it to his employer.

The Court: I don't see that it has any material bearing on the question of whether or not this is a valid enactment.

Mr. Bennett: I don't either, Your Honor. I am just trying to make a record.

Mr. Dunaway: That is what I am objecting to, the Attorney General cluttering up the record.

The Court: He has a right to enter it into the record, if he insists, for the record only.

By Mr. Bennett:

Q. Do you file information called for by Act 10 with other Governmental Agencies—and I am specifically talking about Federal and State Income Tax Returns. Do you ask for exemptions on money given to various agencies in those reports to these other Governmental Agencies and yet you refuse to give the same information to the Little Rock School Board, your employer?

A. No, I don't, because in the State Income Tax you are allowed so much without listing any organizations whatso-

[fol. 118] ever and also on Federal, so as to this time I have not.

Q. You just take the standard 10% deduction?

A. That is right. So far, I have not had more than that.

Q. Does Act 10 violate some part of your conscience?

Mr. Dunaway: If the Court please, this is a legal that Act 10 violates his constitutional right.

Mr. Bennett: I was trying to develop, Your Honor—on direct examination he has not said what constitutional right it violates or proven whether or not it violated his right of association, his right of free speech, or anything else, on direct examination. I don't believe this Court can, and I certainly can't, tell you why this plaintiff is objecting to filing the affidavit under Act 10 right now.

The Court: Go ahead and answer it.

By Mr. Bennett:

Q. What is your objection to filing the affidavit?

A. Well, I believe that the information that is required is unnecessary.

Q. You believe in complying with the law of the state, don't you?

A. Providing it is a just law, and if it is not, I think a person has a right to contest that law.

[fol. 119] Q. In other words, if a law doesn't jibe and fit the pattern of your cloth, you think you should ignore it?

A. I did not say that.

Q. Well, if this is declared to be a valid law, don't you think you ought to comply with the law like everybody else?

A. If I want to continuing teaching, yes. In the State of Arkansas.

Q. Yes. But you think this particular law shouldn't be complied with because of some conscientious scruple? You are not a lawyer?

A. No, I am not.

Q. The Judges decide what the law of the state is?

A. That is right, the Courts.

Q. Can you tell the Court what specific objection to Act 10 you might have?

A. Well, I don't believe that the state has a right to require the School Board to ask for the information required in Act 10, for one thing.

Q. You allege that the Act is unconstitutional. What constitutional right do you have that you think it violates?

A. I do not think it has any right to require what religious belief you are, even if you are an atheist.

Q. Well, if you file that information, this Act doesn't fire you, does it?

A. No, it does not.

Q. You understand that the information you give your [fol. 120] employer, your boss, is to be held as confidential, don't you?

A. Well, it should be.

Q. That is your understanding, that it is confidential, isn't it?

A. As far as I am concerned, it should be confidential. Of course, it may or may not be.

Q. You, as an intelligent, educated, business man, realize the Little Rock School Board would have a right to ask you for this same information when you originally applied for your job, don't you?

A. Most of it.

Q. What part of it wouldn't they have a right to ask?

A. Well, there was part of it that they did not ask.

Q. But, they had the right to ask you before they originally hired you?

A. And you also have the right not to answer.

Q. And you have a right not to be hired?

A. That is correct.

Q. And you are applying for the job now?

A. That is correct.

Q. And the School Board is trying to get you to comply with the state law?

A. That is right.

Q. And you are telling this Court you think it is up to [fol. 121] your individual conscience to decide what the law of Arkansas is and do with it as you have determined and not as the courts have determined?

A. No, not exactly.

Mr. Dunaway: If the Court please, I think he has made that clear.

Mr. Bennett: All right.

The Court: He says he feels he has a right to contest it. He doesn't think it is constitutional and he says that he believes that he should comply with it or else leave the school system in Arkansas. I believe that is the substance of what he said.

By Mr. Bennett:

Q. Let me ask you a couple of questions. This Act 10 hasn't interfered with your right to associate with anybody, has it?

A. You mean as far as talking with anybody or meeting with them?

Q. You can go to any meeting today that you could go to before Act 10 was ever passed?

A. That is correct.

Q. It hasn't interfered with your right of speech?

A. No, that is for sure.

Q. You understand this Act 10 applies to all of the teaching profession throughout Arkansas?

[fol. 122] A. That is correct.

Q. It hasn't treated you any differently than anyone else?

A. No.

Q. You have had free communication of thought?

A. Yes.

Q. Is it your position to tell this Court specifically of any constitutional right you think it might have violated and that is the last question?

A. So far it hasn't violated because I have not complied with it.

Q. Well, has it violated any of your constitutional rights?

Mr. Dunaway: If the Court please, the witness has answered it over and over again and it is improper in the first place.

The Court: I think what the General is trying to ask him is what rights he considers may be violated if he does comply with it?

Mr. Bennett: Yes, sir, that is right.

A. Well, there is a possibility that later on this information, if someone on the School Board thought your religion was wrong, or maybe this organization was wrong, you might be fired because of that.

[fol. 123] Q. Well, do you think your employer has a right to know to which you belong?

A. To a certain degree.

Q. You think your employer has a right to ask you what you belong to before he ever hires you?

A. Yes, but you don't have to answer it, as we went over before.

Q. You are an applicant for the job?

A. That is correct.

Q. And you are telling your prospective employer, I am not going to give you that information? Is that correct?

A. That is correct.

Q. And the School Board has the right to deny you that employment?

A. Yes. I also stated in the letter that I would gladly answer any reasonable question they cared to ask.

Q. You don't have any vested right in this job you have?

Mr. Dunaway: If the Court please, again the Attorney General is trying to get this layman to enlighten him on the law and it is entirely improper.

The Court: That would be a legal question.

By Mr. Dunaway:

Q. The General said you understood that the present School Board was going to keep the information in the [fol. 124] affidavit secret, is that correct?

A. Well, confidential. I don't know about secret.

Q. Were you aware of the fact that on April 12th, 1959, we had another School Board and there was a story in which a spokesman for the White Citizens Council—

Mr. Light: I object to that.

The Court: Don't answer it until he completes the question.

By Mr. Dunaway:

Q. That a spokesman for the White Citizens Council listed a number of places and then Guthridge said he didn't include Little Rock on the list because he had been told by several members of the Little Rock School Board that the Board would make the Little Rock affidavits public. Had you been informed at that time there was a possibility the then Board might make them public?

Mr. Light: If the Court please, I object to the question. Mr. Dunaway is reading from what purports to be a newspaper clipping. Too many of these law suits have been tried in the newspapers already. What the source is that Mr. Dunaway has reference to is not in any way connected with this law suit. They are not parties here.

[fol. 125] The Court: He is not endeavoring to make a party. He is asking the witness what his understanding was with reference to confidential or secret matter.

Mr. Dunaway: Nobody asked him where he got his

present information which he said was that the present School Board planned to keep them confidential. I am asking him if it was his information that the School Board as it was constituted on April 12th, that it might or might not be made public.

Mr. Light: Before he answers that question I would like for him to qualify on the other sources of information and if it is hearsay I will object to it on that ground.

The Court: Objection overruled. Go ahead and he can answer the question.

A. Yes.

By Mr. Dunaway:

Q. Mr. Bennett has made much of the fact that on that affidavit the word "applicant" is used.

Mr. Bennett: It is on his affidavit.

By Mr. Dunaway:

Q. That is what I am talking about. I want you to look [fol. 126] at this one.

Mr. Bennett: They hire from year to year.

The Witness: They apply each year.

By Mr. Dunaway:

Q. Is this a copy of the memorandum which went out from Mr. Terrell Powell, to all certified personnel?

A. Yes, it is.

Q. And this is the affidavit which was sent to all teachers?

A. The mimeographed form, yes, sir.

Q. And on all of them it said, "I, being an applicant"—

A. Uh, huh.

Q. Have you been informed by letter by the Superintendent that if the affidavit is not filed by today, June 25th, prior to the Board meeting, that the Board will cancel your contract?

A. Yes, sir.

By Mr. Bennett:

Q. Mr. Gephardt, how long have you been employed in the Schools?

A. Since August of 1957, two years.

Q. You signed a contract when you were first employed?

A. That is correct.

[fol. 127] Q. And then last year you had to sign another contract?

A. That is correct.

Q. And each year you would sign a contract for the subsequent school year?

A. That is right.

Q. You are employed on a year to year basis?

A. That is right.

Q. And you have been tendered a contract for this year providing you comply with Act 10?

A. That is correct.

The Court: Is there anything further? If not, you may stand aside.

(Witness excused.)

[fol. 128] TERRELL POWELL, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunaway:

Q. You are Mr. Terrell Powell?

A. I am.

Q. And you are the Superintendent of Schools of the Little Rock Special School District?

A. I am.

Q. Is it correct that the plaintiff here, Ernest Gephardt and five other members of the Little Rock Public School System, have failed so far to file a full compliance with affidavit required by Act 10?

A. That is right.

Q. Was there a scheduled meeting of the Little Rock

School Board on May 5 of this year to discuss personnel matters?

A. I believe that is the date of the meeting.

Q. And at that time did you present to the Board a list of school personnel containing those recommended for re-employment and a separate list of the six Act 10 people that was submitted without recommendation?

A. I didn't submit them with or without recommendation. I submitted them for their consideration, because at the time I didn't know what I could legally recommend them for—whether I could legally recommend them or whether I legally could not.

[fol. 129] Q. It was because of Act 10?

A. That is correct.

Q. That they were not recommended?

A. Yes.

Q. And as far as this plaintiff is concerned, but for Act 10, you would have recommended his re-employment?

A. That is correct.

Q. His Principal recommended him?

A. That is correct.

Q. And you have had no complaint of his teaching ability, or any of his associations which would want you, but for Act 10, to discharge him?

A. That is correct. I have had no complaints.

Q. And the same for reasons which I think we have heard about, at the May 5th Board meeting they didn't take any action, and then the School Board met again and at that time June 25th was set as a dead-line for these six to execute the affidavit or have their contracts canceled, is that correct?

A. The letter that I sent, there was a doubt in my mind as to what the interpretation of the letter meant. I will be glad to read it: "The Little Rock School Board has authorized me to notify you that the Board will not be able to re-employ you unless your affidavit pertaining to Act 10 of the Special Session of the 1958 Arkansas Legislature [fol. 130] has been properly executed and submitted to this office before the next regular Board meeting, June 25th, 1959."

Q. But it is your understanding that the Board will take some action tonight? Your Honor, I am trying to get out of committing him to take the position on whether they have a continuing contract or whether they had to be offered one, because that is not his problem. The position of the Board is, as they were notified, that they had to file those by today or else?

A. That was before today's hearing. We will consult with our attorneys and ask them what to do before the meeting.

Cross examination.

By Mr. Light:

Q. Mr. Powell, Mr. Dunaway mentioned 6 Act 10 people. How many people are there in the district who have not signed Act 10?

A. There were six, but in checking back closely, one of them was retired and another one had sent in the resignation with the affidavit, so there are only four whose employment are pending on Act 10.

Q. How many teachers and classified personnel, I believe is the term you used, are in the Little Rock School System?

A. Approximately 400.

Q. Only four have declined to sign and are in the situation of Mr. Gephardt?

A. That is correct.

[fol. 131] By Mr. Dunaway:

Q. Just to keep the record straight, while it is technically true that Mrs. Perkins is retiring at this time, isn't it also true that the reason she is retiring is because of her refusal to execute the affidavit?

A. She didn't say.

Q. Of course, I can't testify as to what she told me.

A. I have a statement here that she wrote.

Cross examination.

By Mr. Bennett:

Q. Mr. Powell, could you tell the Court whether it is true there are approximately 16,000 class room teachers in the State of Arkansas?

A. In round numbers, I think between 14,000 and 16,000, counting college people. I think 16,000 is near correct.

Q. And I believe you said out of 800 in your system, only four were objecting?

A. Well, there were six who did not file affidavits; one resigned and one retiring and four did not fulfill the Act.

By Mr. Dunaway:

Q. Since the Attorney General has asked you that, you don't know how many of them signed them under duress, in order to keep their jobs and not go through the pain of a legal battle; isn't that correct?

A. I do not know why.

By Mr. Bennett:

[fol. 132] Q. Well, you pay your income tax under duress, don't you?

A. Well, I hate to pay it sometimes.

Mr. Dunaway: If we are going into Mr. Powell's income tax.

Mr. Bennett: They talk about signing some affidavit or complying with the law under duress.

The Court: He said he knew nothing about that.

Mr. Bennett: Yes, sir.

By Mr. Dunaway:

Q. That copy which I showed you a moment ago of the mimeographed form, which you sent out to every teacher no matter how long they had been teaching, the mimeographed form listed them as an applicant for a job?

A. That is correct. We mimeograph them in the central office and supply them to the principals for distribution.

(Witness excused.)

[fol. 133] BRUCE BENNETT, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunaway:

Q. You are Bruce Bennett, the Attorney General of the State of Arkansas?

A. Yes, sir.

Q. Did you draft in your office, or cause to be drafted in your office, what is now Act 10?

Mr. Davis: I object to that, Your Honor. That is immaterial in this hearing.

The Court: What is the purpose, Mr. Dunaway?

Mr. Dunaway: The purpose is this, Your Honor. We have alleged that the purpose of Act 10 is not to provide legitimate and relevant information, but to provide a source of information upon the basis of which the school teachers of Arkansas can be intimidated and coerced into refraining from exercising their constitutional rights. By this witness and the next witness that I call, I want to attempt to show what the purpose of this law was.

[fol. 134] Mr. Davis: I think the only place you can find the legislative intent, is either by the author of the bill, or the individual members of the legislature. One member understand it to mean one thing and another might have a different understanding of it.

The Court: I think your primary rule on determining the validity or constitutionality of an Act is from the language of the Act itself. I don't think this is material at all; however, I will let you put it in the record, Mr. Dunaway, if you want to ask him if he prepared that Act.

Mr. Dunaway: If the Court please, I won't argue about the ruling. I do contend there is a distinction between determining what the legislature intended by uncertain language in the Act and I am familiar with the cases that you are referring to that the legislative committee reports and those are the proper things. Our Court has indicated in the Union Carbide case that who put a bill in and why they put it in and why they were supporting it has some

thing to do with the purpose. Not what it means, but why it was actually enacted.

The Court: Go ahead.

[fol. 135] Mr. Dunaway: I will be perfectly candid with the Court that I don't have any case that entirely holds that I can do what I am trying to do.

The Court: I don't believe it is material, but I will let him answer it for the record.

Mr. Bennett: The question, I believe, Your Honor, is did my office—

The Court: Either you or your office prepare the Act.

A. I would like to answer the question in this manner: I went into office January 14th, 1957. At that time, I had prepared 18 bills to aid in segregation in the State of Arkansas. Those bills, some of them, were submitted to the 1957 Legislature. I don't recall which. We then had the incident and the special session was called.

By Mr. Dunaway:

Q. Which incident was that?

A. This business out at the high school. At that time, I put a number of my assistants researching legislation which I anticipated might be called for by some one or more of the 135 members of the Arkansas General Assembly. [fol. 136] There is a publication put out by Vanderbilt University which carries a compilation of all legislation affecting any kind of racial tension that we have had.

This bill, Act 10, was not a part of that. Senator Gregory and myself had coffee quite often. I knew the history about another bill which had been vetoed by the Governor and Senator Gregory expressed the thought that he would like to have some kind of a bill which might get around the objections to the loyalty oath bill which he had introduced in the 1957 session, which by the way I do not—I did not have anything to do with in the preparation or introduction.

I was notified a few days before the special met that they were going to have a special session and somewhere down the line, whether or not it was in 1957, 1958, or when, the substance of this bill had been turned over in the minds of our office. Senator Gregory called me and asked me if

I had the bill and we gave Senator Gregory this bill which he introduced. I had a package of bills, which was known as the "Bennett Package", which ran from House Bill 9 to House Bill 16 which were introduced in the House. This Bill was introduced in the Senate. This Bill, as far as I know, was doctored up, or prepared, or polished, or whatever you want to call it in the Office of the Attorney General.

Q. Did I understand you to say this Bill, along with others, was prepared when you knew of the forthcoming session?

[fol. 137] A. No, sir, this Bill—I can't tell you, Mr. Dunaway, whether this was prepared in 1957 or 1958 or when exactly. We have got a file out there now, if you had a special session, which is available.

Q. I believe you said it was one that you had prepared over a period of some time that you had prepared in aid of segregation?

A. No, sir. This Bill was not designed as a segregation Bill.

Q. What was it designed as?

A. This Bill was drawn up through conversation with Senator Gregory. He had had a loyalty oath bill vetoed and in the veto message there were certain objections to the loyalty oath bill and this bill was designed to try to get around those objections that had been manifest in the loyalty oath bill. This bill fires no one. All that it does is ask that an employer ask for certain information about a prospective employe.

Q. And is it your opinion as the Attorney General still, as it was in the letter, that the law does not require local boards to keep this information confidential, but that is a discretionary matter with the board?

A. There is nothing in Act 10 which makes the information absolutely confidential. There is another statute which we cite here, which permits a school board to go into exe-[fol. 138] cutive session about personnel affairs, which information is confidential, to consider privileged matters, communications and information concerning individuals, which I cite in the opinion to Mr. Rowland. Unless some Act specifically makes it confidential, I didn't know what else to tell them.

Cross examination.

By Mr. Davis:

Q. During a legislative session, how many bills approximately does your office draft?

A. I could give you an approximation. Of course, we have 135 members of the House and Senate. We draft legislation continuously for 60 days during the and then prior thereto sometimes you can anticipate legislation that will be introduced.

Q. Don't you also have in your files legislation that wasn't passed, but we still have bills concerning the same?

A. Oh, yes.

The Court: It is part of your duties as Attorney General to prepare bills for all members of the legislature?

The Witness: Yes, sir. I might add this: We have had people in the House or Senate come in and want you to draft some bill and I think it is my duty to tell them whether or not I believe that legislation to be constitutional. Some-[fol. 139] times I don't agree with the contents of a Bill, but that is not up to me to decide.

By Mr. Dunaway:

Q. Did you advise them that Act 115 was constitutional?

A. I drew Act 115 and it has served its purpose well.

Q. Regardless of whether it was constitutional it served its purpose and Act 10 will serve a similar purpose?

A. I don't know what he is talking about.

Mr. Davis: I believe he was my witness.

The Court: Yes, go ahead.

Q. You don't have any vote in the House?

A. No, sir.

Mr. Davis: That is all.

Mr. Dunaway: That is all.

(Witness excused.)

[fol.140] AMIS GUTHRIDGE, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunaway:

Q. You are Amis Guthridge, an attorney of the City of Little Rock?

A. Yes, sir, I am.

Q. And what is your official position with the Capital Citizens Council?

A. I am the attorney for the Capital Citizens Council and a member of the Board of Directors.

Q. Is that a state-wide organization or affiliated with others?

A. It is a local organization with members primarily in Little Rock, North Little Rock and other parts of Pulaski County, although there are some members who live in other parts of the State. It is not restricted necessarily to Pulaski County.

Q. Are there other Councils in the State?

A. There are other Councils in the State and then there is a State Organization known as the Association of Citizens Councils of Arkansas and in which the local Councils are affiliated. Then, the State Association is affiliated with [fol. 141] the Citizens Councils of America, that is, with other State Associations?

Q. Now, I am sure I won't state this quite to your satisfaction, but is the purpose of the Citizens Council to preserve segregation and of finding all available means of avoiding compliance with the United States Supreme Court's Decision in the Brown and subsequent cases?

A. Our purpose, or rather our way of avoidance, or attempts to avoid the U. S. Supreme Court decision in Brown vs. Board of Education is exactly the same as Mr. Gephardt testified to as to how he would like to avoid Act 10. In fact, ours is not quite as exact as his. You have asked two things. On all of our stationery or literature rather, it says we stand for States Rights and racial integrity and then, as far as Brown vs. the Board of Education

decision, we have always stated we would oppose that in every legal, moral and honorable manner at our command.

Q. And have taken the position that is not the law of the land and, therefore, you may oppose it in every legal way?

A. We have taken the position that the law of the land is composed of the Constitution of the United States, treaties entered into by the U. S. and by-laws enacted by the Congress of the U. S. and not laws made by any Court, including the United States Supreme Court.

[fol. 142] Our position is that the United States Supreme Court illegally usurped authority that it does not possess.

Q. Now, Mr. Guthridge, you said there were several Councils. Roughly, how many cities or counties have either actual, separate units of the Council, or are affiliated by membership with the Capital Citizens Council?

A. Do you mean how many various Councils are in the State of Arkansas?

Q. Approximately?

A. I don't have that information exactly, but I would imagine from 40 to 50.

Q. Pretty well scattered throughout the State?

A. Yes, sir.

Q. I want to hand you two things from the Arkansas Gazette, the first dated April 12th, 1959, which purports to quote some statements that you have made and activities that you propose to engage in, under or in relation to Act 10—and in order to save time I will give you both of them—another clipping from the Arkansas Gazette dated April 30, 1959, which is a report of a statement which you issued to The Traveler Paper at the University of Arkansas, as your reaction to the University of Arkansas Faculty opposition to Act 10. I would like to ask you to read them.

[fol. 143] A. I will tell you the way I will agree to answer your question about these. The statements, particularly this one, is very comprehensive and I want to make an explanation of the whys and wherefores of these statements, rather than just read the statements.

Q. All right. And if the Court please, if I may suggest it, what I had in mind is if you will read them and have in mind what is there, then I would like to ask you about particular

parts of them without having to come and hand you that part and then you may certainly make reference to it.

Mr. Bennett: If the Court please, this is plaintiff's witness.

Mr. Dunaway: He could hardly be termed a friendly witness.

Mr. Bennett: You don't mind me stating my objection, do you? I don't see that any of it is relevant as to whether or not Act 10 is constitutional—what appeared in some newspaper. I don't know what the connection or purpose is, what Mr. Guthridge's statements may have been or what his ideas are about the Act. What bearing would that have on its validity?

Mr. Dunaway: It goes to the very guts of my theory of this law suit and that is by providing information which [fol. 144] will be made public, that these teachers will be denied their constitutional right of association and free speech and freedom of assembly by being scared of exercising them and I think we are entitled to prove that that will be the practical effect of the operation of Act 10 under the U. S. Supreme Court decisions. I would like to make it for the record, in any event.

Mr. Bennett: His own witnesses, his own plaintiffs, under cross examination, have testified that they have not been denied the right of association in any respect by Act 10. Now, he is trying to disprove something that he has already proved.

The Court: His witnesses have not complied with it yet, they stated. They have not complied with Act 10, but what he is trying to prove is the results that might occur if they do comply with the Act. Is that right, Mr. Dunaway?

Mr. Dunaway: That is correct, Your Honor.

Mr. Bennett: Both of them said they were not going to comply with it.

[fol. 145] The Court: I understand that, but he is contending that there is a class action here and it might affect various others. Let him go ahead and answer the question with any explanation he wants.

A. Well, it has scared off 4 out of 800 in the City of Little Rock so far.

The Court: I don't think, Mr. Dunaway, it is necessary to take the time to have Mr. Guthridge read all of this. You can put them in the record as Exhibits.

Mr. Dunaway: I wanted to ask him about the statements. Unless he admits that they are all accurate statements, I don't think he could just introduce a copy of the Gazette, or even one from the Democrat.

The Witness: I can lift the quotes out of here and tell you whether or not I said it, but I also want to tell you why I said it.

Mr. Bennett: It doesn't make any difference what Amis Guthridge does with this information should he get it. If it is made public to Amis Guthridge, it would be made public to everybody.

Mr. Dunaway: That is precisely the point of my law suit. [fol. 146] The Court: Go ahead for the record.

A. Here is a quotation from the Arkansas Gazette, April 12, 1959, fourth paragraph: "Guthridge said his information was that 'many professors in two institutions of higher learning' were committing perjury in their affidavits by not listing all the organizations to which they belong." We have that information, that in two institutions of higher learning, including the University of Arkansas and the Medical Center at Little Rock, that was being done at that time. Now, the other is not a direct quote about the photostats.

By Mr. Dunaway:

Q. Was it your opinion and is it your opinion that your group is entitled to get photostatic copies of these affidavits for such use as you may want to make of them in purging the schools of undesirable teachers?

A. At that time it was our information that the affidavits were public records and in that article I stated that we would photostat affidavits from the Arkansas State Teachers College at Conway, the University of Arkansas at Fayetteville, and the University Medical Center at Little [fol. 147] Rock. Also, five high schools, Fayetteville, Van Buren, Fort Smith, Charleston and Hoxie. The reason that we wanted to do that, as I just said, is that we had direct

information that certain professors and teachers were not complying and that they were going to—which is listed later in the article—list organizations like the Red Cross, their Church and the Community Chest and fail to list some organizations that would reflect upon them.

Q. Right there. Such as the NAACP?

A. I believe in that article it says such as the NAACP and Urban League.

Q. Briefly, for the record, the Urban League is an interracial organization?

A. You would know, because you are the President of it locally. I never have attended a meeting.

Q. You are invited to come to the next one.

A. Thank you.

Q. All right. The Women's Emergency Committee to Open Our Schools?

A. Yes, sir.

Q. Again, for the record, it is agreed that that is an organization of Women organized for the purpose of getting the Little Rock Public Schools open and kept open?

A. Integrated.

Q. Segregated or not segregated?

[fol. 148] A. Integrated. With outside aid and outside money. About the photostating, the Attorney General of the State of Arkansas ruled those were confidential records, as has been brought out here today, and they would not be made public unless the Board so desired.

Q. But if they were public, you would use them for the purpose you announced, at this time?

A. Not to purge. You used the word purge.

Q. Is that an unpopular word now?

A. Eliminate from the system.

Mr. Bennett: I would suggest counsel is arguing with his own witness. He is bound by Mr. Guthridge's answers. He subpoenaed Mr. Guthridge and should refrain from arguing with him.

A. Let me get into the next argument. I believe that is all of the pertinent information there and I will get specific with you, Mr. Dunaway. This is from the Arkansas Gazette of April 30th, 1959. Now, there is quite a long quote here. Shall I begin?

The Court: Go ahead and ask him, Mr. Dunaway, what you want to ask him about.

By Mr. Dunaway:

Q. Yes, sir. I would like to have each quote in there read [fol. 149] and state whether or not you made that quote.

A. All right, sir.

Q. Did you say that the teachers are chained and bound to silence by the national and state leftwing socialist organizations which control their positions and destinies?

A. I did and that is a statement of fact.

Q. And that communism has a beachhead in Arkansas education and that headquarters for this alien brain laundry in Arkansas is the University of Arkansas at Fayetteville and the Medical Center in Little Rock?

A. Yes, sir. Now, a comment on that. We have information that the communist apparatus is very active at the University of Arkansas at Fayetteville. That is the reason we are so strongly for Act 10. We believe that the parents have a right to know what kind of people are teaching their children. We know of one professor at the Medical Center at Little Rock who is an ex-convict ineligible to serve there, but he is serving in the capacity there and belongs to subversive organizations. Briefly, that is some of the information as to why I made that statement. Not in this article—there were several, Mr. Dunaway—I made the statement that at a later date I was going to give some shocking information. We have some information I believe the parents of the students at the University of [fol. 150] Arkansas would be interested in, to the effect that there is a wide-spread homosexual ring there, involving male student teachers and male students.

Mr. Bennett: We object to that line of testimony, Your Honor. The sole question is whether or not Act 10 is constitutional and I can't see where this has any bearing upon the constitutionality of Act 10.

The Court: I think, Mr. Dunaway, you ought to confine it to his references to Act 10, not to everything generally.

Mr. Dunaway: That is what I was trying to do, except

I agreed as far as I was concerned Mr. Guthridge could make any additional comment he wanted to make.

The Court: Confine it to the proposition before the Court, Act 10.

By Mr. Dunaway:

Q. Did you make the statement that teachers all over Arkansas are signing Act 10 affidavits. They are not afraid. But a rat is afraid of the light?

A. That is correct.

[fol. 151] Q. And did you say that when informed that the University Board had decided that the affidavits filed under Act 10 were to be considered private, they should remember that besides the Court the people still have in each county a Grand Jury which can look at the affidavits as well as other goings on? Also, the Legislative Council can and, I believe will, cooperate with the parents who file particular charges?

A. I made that statement and I think that is a legal way to proceed.

Q. To get the information?

A. Yes, sir. In fact, if the Court would like to have this information brought out I could intervene in this suit and bring some of these questionable people in here and put them under oath and find out whether these statements are true or not.

Q. I take it that was a question addressed to the Court. Did you make this statement and do you make it now? Is it your position now? "If you do not belong to Communist, pro-Communist or other organizations like the NAACP, the American Civil Liberties Union, the Urban League, the American Association of University Professors or the Women's Emergency Committee to Open Our Schools, you would have no objection." Then, "if a teacher does, he should silently fold his tent and go North like Dr. Lee Lorch."

A. I said that. Now, Mr. Dunaway, the American Asso-

[fol. 152] ciation of University Professors at the University of Arkansas has led the fight against Act 10, I believe is correct. About the time this Act was coming into use

the American Association of University Professors came out and criticized and put on their bad list, Fisk University, a negro University in Nashville, for failing to renew the contract of a known communist, one Dr. Lee Lorch, formerly of Little Rock. He and his wife, Grace Lorch entered into the Little Rock integration tragedy very muchly when he was connected with the Philander Smith College, Negro Methodist College, have been cited by the Senate Subcommittee on subversive activities as being Communist functionaries. They are. I am making that statement. The American Association of University Professors denounced Fisk University and took some sort of reprisal against them this Spring for in 1954 failing to renew the contract of Dr. Lorch in Nashville, Tennessee, because he tried to enroll his little girl—and he is a white man—into an all negro grammar school there. They did that in the face of the fact that he is a communist and I make that statement to substantiate some of our thinking on some of the very, very small minority that has infiltrated the University of Arkansas and the Medical Center and one in particular at Arkansas State Teachers College at Conway.

[fol. 153] Q. And did you say finally, "while some persons who might refuse to sign Act 10 affidavits had nothing to hide, but if they feel that way they ought to get the heck out of Arkansas."

A. I believe that, because the dearest things to the parents are their children, regardless of whether they are six years old or twenty and if they are in an institution of higher learning they have a right to know the people who are going to have such great influence on the lives of their children, both morally, educationally and socially. We believe that and I think that they are unfit if they will not sign such an affidavit because they do have something to hide. Another thing, if they should go and be an employee of the United States of America, any agency, or in the Armed Forces, they get all of that information. They even fingerprint them and I think the State of Arkansas has that same right. As has been pointed out there is no penalty involved, but there have been very, very few in the State of Arkansas who have refused to sign the affidavit.

Q. But, I believe you did testify earlier that Act 10 had already gotten rid of four teachers in Little Rock?

A. No, I didn't say that. When you said it was to scare them, I said that four out of the 800 were scared in Little Rock, because they were the only ones who refused to sign it.

Q. And it is the position generally of the Citizens Council that since the desegregation decisions are not the law of the [fol. 154] land, that any teacher that supports organizations which support desegregation are at least suspects, is that correct?

A. I didn't say that. And I did not come out and make a blanket statement about the law of the land, as you have said. I told you what we interpreted the law of the land to be and I said that I thought the United States Supreme Court usurped powers it did not possess, but I don't want you to get me to testify that I said absolutely it was not the law of the land. I don't believe I said it absolutely. I will say this, though: The NAACP was under the law of the land in a decision and they took it up, I think 26 times, before it was reversed and maybe there is some hope for the white folks.

Mr. Dunaway: Thank you, Mr. Guthridge.

Mr. Bennett: No questions. At this time, we would like to move this general line of testimony of Mr. Guthridge be stricken from the record as being irrelevant and immaterial as to the invalidity or validity of Act 10.

The Court: I have ruled it inadmissible already, but let it in for the record.

(Witness excused.)

[fol. 155] Mr. Dunaway: I would like to introduce the deposition of Senator Artie Gregory.

Mr. Bennett: At this time, Your Honor, we would like to object to the deposition of Senator Artie Gregory. I believe it is to be introduced to show the legislative intent. Once again, we have 135 members of the House and Senate. After it gets through there, it has to be signed by the Governor. Now, what the intent of one individual Senator or Representative is certainly doesn't determine the legislative intent. Is that the object for which it is introduced?

Mr. Dunaway: I still insist upon making the distinction which I have been making every time we argue this point. It is being introduced for the purpose of determining what the purpose of the Act was, not what the intent was, in any particular language.

The Court: Before we rule on the objection, is this a short deposition? Can you state the substance of it?

Mr. Dunaway: The substance of it is in 1955 Senator Gregory attempted to get a loyalty oath bill through and then he goes into several pages of discussion about a visit [fol. 156] that he had from a teacher at Arkansas State Teachers College that had run into loyalty oaths before. Substantially, the substance is this: That he then had another loyalty oath bill, succeeded in having it passed in 1957; that the Governor vetoed it; that in the Special Session the Attorney General, knowing of his interest in these matters, brought him a bill which had been prepared in the Attorney General's Office and that generally the idea was to get at subversives. I suggest that it simply be introduced without reading it.

The Court: I will let it in for the record.

OFFERS IN EVIDENCE

(Thereupon, said deposition was admitted for the record as Exhibit No. 3.)

The Court: I don't believe it is material, but I have let it go into the record for him to make his record on appeal.

Mr. Davis: You did rule it was immaterial?

The Court: Yes, sir.

Mr. Dunaway: If the Court please, as Exhibit No. 4, I would like to introduce a copy of the Proclamation of the Governor, calling the Second Extraordinary Session of 1958.

[fol. 157] The Court: Without objection, let it be introduced.

(Thereupon, said document was marked for identification as Exhibit No. 4 and received in evidence:)

Mr. Dunaway: Then, as Exhibit No. 5, plaintiffs would like to introduce a certified copy of the Address of Gov-

ernor Orval E. Faubus, delivered to the second Extraordinary Session of the General Assembly on August 26, 1958.

The Court: Let it be marked.

(Thereupon, Exhibit No. 5 was marked for identification.)

Mr. Davis: We would like to object to the address by the Governor as being immaterial in this matter as to whether or not Act 10 is constitutional.

The Court: You are not talking about the Call of the Governor, but the speech he made to the General Assembly?

Mr. Davis: Yes, sir.

The Court: I don't see the materiality of it. Let it go in for the record.

(Thereupon, Exhibit No. 5 was admitted for the record.)

[fol. 158] Mr. Bennett: We would like to have the record show the objection.

Mr. Dunaway: He has ruled with you on it. Since complete copies of Act 10 are hard to come by, I would like to introduce a certified copy of Act 10 of the Second Extraordinary Session.

Mr. Bennett: And I would like to introduce a copy of the Attorney General's opinion, in regard to affirming rather than swearing.

The Court: Without objection, let them be introduced.

(Thereupon, said instruments were marked for identification as Exhibits 6 and 7 and were received in evidence.)

Mr. Dunaway: That is all.

The Court: Do you have any testimony, Mr. Bennett?

Mr. Bennett: No, sir.

The Court: Or the School Board?

Mr. Light: No, sir.

[fol. 159]

REMARKS OF CHANCELLOR MURRAY O. REED AT CONCLUSION OF TRIAL, JUNE 25, 1959

Gentlemen, the first question presented here, and I presume should be disposed of first, would be the question raised by the plaintiffs with reference to this Act not being within the purview of the Governor's Call. No matter how valid the Act might be otherwise, if it should not fall within the Call of the Governor, the entire Act would fail.

I have before me the Call and in the No. 1 Paragraph the Governor says the call is to consider and, if so, advise and enact laws for the following purposes: No. 1 is to regulate the administration and financing of the public schools, etc. I think the key word in that Call, as far as it relates to this Act, is the word "administration", which seems to me in a liberal view it would include the employment of teachers, because that would be a necessary part of the administration, and the employment of teachers, the applications, questions and other things connected therewith would be a part of it. In view of that, I would hold that Act No. 10 does come within the purview of the Governor's Call.

The next question raised, I believe, by the plaintiffs is that there are some teachers who might be in a position [fol. 160] of having to make an affidavit, which would be against their conscience and prohibited by the Constitution in that they would be required to swear. This is the usual form of affidavit, which I take it may be complied with by using the word "affirm", as well as the word "swear". Then, in addition to that, the Act itself says that the affidavit shall be substantially in the following form, which wouldn't mean they had to use every word exactly like the form sets forth in the affidavit. I think that allegation would go out and the Act would not be invalid for that purpose.

The other and main contentions presented here by the plaintiffs are the Constitutional provisions contained in Article No. 2 and certain Sections of the Constitution of the State of Arkansas and other provisions of the Federal Constitution, which to my mind are somewhat similar and almost exactly the same. In view of the general rule, which I believe both sides will admit here, that all Acts should be

upheld if possible, unless they are clearly contrary to the Constitution and in view of the fact that in my opinion these provisions of Act No. 10 are primarily legislative and not judicial—I recognize the fact that many people may disagree with the provisions of this Act and it may require certain things that are not necessary. As the Federal [fol. 161] Judges said, I believe, in their opinion, it might even go so far as to be insulting, but I agree with the Federal Judges on the point that it is a legislative question and not a judicial one.

So, in view of all the testimony and the arguments of counsel and of my reading and studying this Act, I will rule that the Act is valid and it is a valid enactment.

[fol. 162]

EXHIBIT No. "1"

UNIVERSITY OF ARKANSAS—OFFICIAL APPOINTMENT

(Stamp)

JUN 23 1959

To Max Carr

Under authority of the Board of Trustees you are hereby employed as Associate Professor—Music

at the University of Arkansas at a salary of $5,300.00 a year payable on a monthly basis on the last day of each month. The period of employment will be from September 1, 1959 to May 31, 1960 inclusive, subject to tenure regulations and subject to the condition that should legal procedures preventing the Board of Trustees of the University of Arkansas from enforcing Act 10 of the Extraordinary Session of 1958 be terminated in any manner, you will then comply with that Act by filing the required affidavit thereunder on or before a date then set by the University.

/s/ J. E. POMPIT
Secretary, Board of Trustees

NOTE—The employee is requested to sign below, retain one copy and return one to the Office of the Secretary, Board of Trustees.

I accept the above position and agree to abide by the regulations prescribed by the Board of Trustees from time to time.

NOTE—An appointment to a position in this institution is authoritative only when made in writing by the Secretary of the Board.

(s) Max Carr
Employee

JEP

Date 19 May, 1959

[fol. 162a]

Exhibit No. "2"

STATE OF ARKANSAS
OFFICE OF ATTORNEY GENERAL

COPY

April 21, 1959

Mr. Ben D. Rowland
Little Rock School Board
Little Rock, Arkansas

Dear Mr. Rowland:

This will acknowledge your recent letter in which you request my opinion on various phases of Act 10 of the 61st General Assembly (2nd Ex. Sess.), said act having to do with the filing of certain affidavits by administrative and professional employees, school superintendents, principals, and instructors of the elementary and secondary schools, colleges and University of the State of Arkansas.

You pose the following questions:

1. When does Act 10 become effective relative to teachers' contracts?

2. We should also like to know whether these affidavits when secured will become a part of public record or whether they shall be made available only for official use?

Ark. Stats. (1947) § 80-1304 provides that each teacher's contract shall automatically be renewed unless notified, in writing, within 10 days after the close of the school term that it will not be renewed. In other words, if the Board of Directors of the school district should fail to notify the teacher in writing within 10 days after the close of school of the spring term that it will not be renewed for the subsequent year, it is renewed automatically.

Since Act 10 did not become effective until August 28, 1958, it did not apply to any teacher's contract made prior to that date. It is a matter of common knowledge that school terms close in the spring of each year and, therefore, is applicable only to those contracts made after the effective date of the act which was August 28, 1958, and, of course, applies to the 1959-60 school term contracts.

I am herewith enclosing a copy of Act 10 and it should be noted in Section 1 thereof the following words:

> [fol. 162b] It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

Ark. Stats. (1947) § 6-604 provides as follows:

> The meetings of each and all Boards and Commissions of this State, and of the political subdivisions thereof, including counties, cities and towns, and of meetings of City Councils, and the meetings of each and all departments and agencies of the State, or its political subdivisions, and of all public institutions of the State or its political subdivision and of each and all meetings

of the County Board of Education and of each and all meetings of the Board of Directors of local school districts shall be open to the public, *except in those instances when such Boards and Commissions meet to consider privileged matters, communications, and information concerning individuals.* In such instances where such Board or Commission meets to consider such privileged matters, communications, and information concerning individuals it shall be unlawful for said Board to take any official action on any non-privileged matter. . . . (Emphasis supplied.)

The Act contemplates the disclosure of information to the Boards as such who in turn are under a compulsion not to renew a contract unless such affidavit be filed. It provides penalties for persons making false affidavits with forfeiture of license to teach.

The Boards of Trust of the University, State Colleges and the Board of Directors of each school district in this State serve without compensation. The Board of Directors of each school district are elected by the people of that district and the confidence and trust of the people have been lodged in the public spirited citizens who serve as members of these Boards. I feel quite sure these Boards are able and capable of reviewing the affidavits required by Act 10 and acting in accordance therewith.

As the School Boards of this State and the Boards of Trust of the University and State Colleges are composed of responsible men and women and Ark. Stats. (1947) § 6-604 provides that they may meet in executive session, I am [fol. 162c] of the opinion that the affidavits that are required by Act 10 should be used solely within the letter of the law as recited in Act 10 and it is an administrative determination, to be made by the respective Boards, as to the disclosure of information contained in the affidavits.

Yours very truly,

BRUCE BENNETT
Attorney General

BB:rfh

Encl.

[fol. 163]

EXHIBIT No. "3"

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiff,

vs.

R. A. YOUNG, JR., Chairman, et al., Defendants.

No. 112877

ERNEST T. GERHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., President, et al., Defendants.

DEPOSITION OF THE WITNESS, ARTIE GREGORY TAKEN ON BEHALF OF PLAINTIFFS.

DATE: 6-25-1959

SCRIVNER MIZELL

GENERAL COURT REPORTER
PYRAMID LIFE BUILDING
LITTLE ROCK, ARKANSAS

[fol. 163a]

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 112819

MAX CARR, for himself and others similarly situated, Plaintiff,

vs.

R. A. YOUNG, JR., Chairman, et al., Defendants.

No. 112877

ERNEST T. GERHARDT, for himself and others similarly situated, Plaintiff,

vs.

EVERETT TUCKER, JR., President, et al., Defendants.

DEPOSITION OF THE WITNESS, ARTIE GREGORY, TAKEN ON BEHALF OF PLAINTIFFS.

APPEARANCES:

HON. EDWIN E. DUNAWAY, Union Life Building, Little Rock, Arkansas, Attorney for Plaintiffs.

HON. BRUCE BENNETT, Attorney General, State Capitol Building, Little Rock, Arkansas, Attorney for Defendants, by HON. BILLY JOE DAVIS.

The deposition of the witness, Artie Gregory, taken on the 25th day of June, 1959, beginning at the hour of 10:00 o'clock, at the offices of Artie Gregory Construction Company, 1615 East 15th Street, Little Rock, Arkansas, on behalf of the plaintiffs in the above styled causes to be read in evidence in said causes pending in the Chancery Court of Pulaski County, Arkansas, wherein Max Carr, for him-
[fol. 163b] self and others similarly situated, is plaintiff

and R. A. Young, Jr., Chairman, et al., are defendants; and Ernest T. Gerhardt, for himself and others similarly situated, is plaintiff and Everett Tucker, Jr., President, et al., are defendants.

THEREUPON, the following proceedings were had, to-wit:

Mr. Dunaway: It is stipulated and agreed by and between Counsel for the respective parties that the deposition of the witness, Artie Gregory, may be taken at this time and place, by agreement of counsel; that all formalities as to the taking of said deposition are waived, including presentation, reading and subscription by the witness; notice of filing, filing, etc., that all objections as to relevancy, materiality and competency are expressly reserved and may be raised if and when said deposition is offered at the trial of the cause.

THEREUPON,

ARTIE GREGORY,

called as a witness, after being first duly sworn by the undersigned Notary Public, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Dunaway:

Q. You are Artie Gregory?

A. Yes, sir, I am.

[fol. 163c] Q. And a member of the Arkansas State Senate from Pulaski County?

A. I am, yes, sir.

Q. Senator, I believe you served in the Second Estraordinary Session in 1958?

A. I did.

Q. And did you introduce as Senate Bill No. 8 what ultimately was enacted into law as Act 10 of that Session?

Mr. Davis: Note my objection to that question. It has no—it is completely inadmissible in this type hearing for any reason.

Mr. Dunaway: May I suggest this? See if this suits you, that in order to expedite matters it is understood that every question is objected to on any basis on which it might be objected to?

Mr. Davis: That will be fine.

Mr. Dunaway: I realize the whole thing is arguable.

Mr. Davis: Yes, sir, but I just wanted it in the deposition, in the record.

Mr. Dunaway: Yes.

The Witness: Well, I haven't answered his question yet.

Mr. Davis: Yes, sure, go ahead.

By Mr. Dunaway:

Q. Go ahead. Answer it. Then the court will decide whether or not—

[fol. 163d] A. Yes, I answered it.

Q. And what was the purpose of this affidavit law, Senator?

A. Now, this goes back to my—my intention of this would go back to 1955 Session in which I had sought for sometime and I had talked to other Senators about it, and they also felt that we had some subversive teachers in the State of Arkansas, but having a child of my own going to school and having the most respect for all children, that if that were true, I wanted it stopped for I didn't want my child going to a subversive teacher. Neither did I want any other children going to school to them, so in 1955, I introduced a bill, a Loyalty Oath Bill, passed it in the Senate without a dissenting vote. It went to the House and I was unable to ever get it called up in the House, so it died right in the House. Now, then before I go farther, I want to back up and talk a little bit about that 1955 Bill I passed. As I recall, it passed the Senate on a Thursday evening and it came out in the Arkansas Gazette Friday. We adjourned Friday at noon and I went to the Revenue Department as there was some legislation pending pertaining to the Revenue Department and I wanted to talk to Billy Woodyard about it and I was sitting in Billy Woodyard's office talking to him and there was a gentleman came to the

door of Billy's office, just barged in, and he says, "Are you Artie Gregory?" And I said I was. He said, "Did you introduce Senate Bill so-and-so?" I said, "I did." And he [fol. 163e] says, "Well, I want to talk to you about that." Well, he was perspiring. He was just wrining wet with sweat as if he had jumped in a tub or bath of water and he looked just a little bit suspicious and I said to him, I said, "You have a seat out there. When I get through I will talk to you." He sat down on a seat outside of Billy's office and I winked at Billy and nodded my head and I says to Billy where this guy could not hear me, I says, "Let's go to the coffee shop a minute." I went into the coffee shop cafeteria there in the building in the basement. I went in there and I called the State Police and I asked them if they had any plain clothesmen around. They said they did. I said, "I would like to have one or two to meet me in the cafeteria of the State Capitol as soon as possible." I says, "I will explain to you later why," and about—we sat down and drank a cup of coffee and in about five minutes there was two boys showed up in plain clothes. We walked back in Billy's office. By that time this guy had got his wife. I don't know where she had been, but she was with him and they had a little handbag, an army bag, that they couldn't zip it shut. It was open, just had to hold the handles carrying it and we walked in Billy's office and I introduced him to these guys, these State Police, as my colleagues and I said, "Now, anything you have got to say to me or ask me, they are entitled to hear it, so just cut [fol. 163f] loose," and he asked Billy Woodyard to excuse himself and Billy did, so the two State Policemen, myself, this guy and his wife sat in there and talked and he told me the story. He says in 19—I don't recall the year, but anyhow, he was teaching school in Ohio and they passed legislation similar to this, to that bill and ran him out of the state and he went to Mississippi and went to teaching down there and they they passed legislation of some type down there, that they run him out of Mississippi. Then he went to Texas and he started teaching out there and they had a Loyalty Oath Bill of some type in Texas which he said was exactly like this one, but I told him I didn't give a blank what they had. I didn't know nothing about it

and this wasn't copied after Texas and he said they run him out of Texas and said furthermore he served time in Texas. That Bill down there, the penalty was they withheld your salary plus you served some time and by him signing a false statement, when they caught up with him, he served time plus they withheld his salary and he says, "When I got out of there I came to Arkansas," and he had been here about a year and he said, "Now, here you are after me again." He says, "If you don't withdraw this Bill, I am going to have to commit suicide," and he just kept repeating that and stuttering. He wasn't talking nearly as plain as I am talking and he kept repeating that so finally I got tired of listening to him and I said, "Listen, [for. 163g] let me tell you something." I pointed my finger at him. I said, "Listen, let me tell you something. There isn't a law on the Statutes that will prohibit you from committing suicide. My suggestion is go to it. I would suggest you get out of the Capitol Building before you do it," and I walked off, leaving him sitting there. Now, then on Monday, Silas Snow came down at noon, called me out of the Senate, he and another one or two of the Board Members up there, and was apologising to me about this guy. He was a teacher at Conway.

Q. Yes, sir.

A. At State Teachers. They were apologising for this all coming up. They said they didn't know they had him. I said, "I don't know nothing against you fellows. Why I am sure you didn't know it," and they said and I asked him. He said, "This morning when I got to my office, he was standing at the door," and he said that as I say, he was just perspiring all over and he says, "I have got to talk to you." Silas invited him on in. He is President. You know him?

Q. Yes.

A. And he says, "I asked you those same questions when I hired you," and he said, "Why did you lie to me?" He said, "Well, I was broke and I had to have a job," and Silas says, "Well, you haven't got any now, so start." So Silas came down and was apoligising to me and told me the story. I said, "Well, what did you do with him?" He said,

[fol. 163h] "I told him to get out of the State at once." So that—

Q. Well, I believe that Bill was defeated in '55 and then you introduced another Loyalty Bill?

A. That is what I am getting to. This was all in '55 I am talking about. In 1957, I introduced another one and passed it.

Q. That was a Loyalty Oath Bill?

A. Yes, sir. I passed it in the Senate and it passed in the House and the Governor vetoed it and then in this Extraordinary Session of '58, the Attorney General's office drew this Bill of which I was going to introduce one. I was going to have one drawn.

Q. You were going to have a Loyalty Bill similar to the one—

A. Yes, sir, I was going to have one and I saw this one and I asked him to let me introduce it.

Q. This is the Attorney General?

A. Yes, sir, I asked him to let me introduce this Bill, due to the fact that I had been trying to get something through in '55 and the '57 Legislature both. He gave it to me and I introduced it. Now, that is—

Q. The purpose of—

A. As far the purpose of it, I think I have pretty well established that, that I had been told that we had subversive teachers and by this experience I had of this teacher [fol. 163i] from Conway coming down here made me feel like that it was true and, if so, I certainly wanted to smoke them out.

Mr. Dunaway: I believe that is all. Do you have any questions?

Cross examination.

By Mr. Davis:

Q. Just a couple of questions, Senator. Isn't it a general practice of the late Legislature and has been for a number of years, to have the Attorney General draw Bills for them, put them in final drafting form?

A. Oh, yes, I have had him draft many a Bill for me, yes, sir.

Q. So, in other words, the procedure wasn't an unusual thing to your knowledge?

A. No, sir, I have had him draft bills for me. I have had he and the Legislative Council, Marcus Hallbrook, draft all my bills out there. If one was busy I would get the other one. If I was in a hurry for a Bill, I would switch back and forth. I have never hired no attorney.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dunaway.

Q. That is a frequent practice. In this case the Attorney General showed you this Bill which he had already prepared?

A. Yes, sir, yes, sir.

Q. Oh, there is one other question. Did any of the [fol. 163j] school authorities or teachers' associations or any groups of that kind ask you to have such a Bill drawn? I mean it was your—

A. Did they ask me to have? No, sir, they did not.

Mr. Dunaway: I believe that is all.

The Witness: Neither was there one single person said one word in opposition to this Bill when it was introduced before it was passed the Senate and the House. Now, before, in 57, they had a public hearing in opposition to that Loyalty Oath Bill.

Mr. Dunaway: But there was no public hearing on this Bill?

The Witness: No, sir, there wasn't.

Mr. Dunaway: I believe that is all.

Recross examination.

By Mr. Davis:

Q. No organized teachers' organizations have protested to you the enactment of this Bill, have they, Senator?

A. Not one single letter.

Mr. Davis: That is all.

(Witness excused.)

THEREUPON, the taking of the deposition was concluded.

[fol. 163k]

STATE OF ARKANSAS)
COUNTY OF PULASKI)

I, SCRIVNER MIZELL, a Notary Public, within and for the county and state aforesaid, duly commissioned and acting, hereby certify that the above and foregoing deposition of the witness, Artie Gregory, was taken before me at the time and in the actions mentioned in the caption hereof, the said Artie Gregory, being first duly sworn by me that the testimony he should give in said cause should be the truth, the whole truth and nothing but the truth; that his statements were taken down in shorthand and thereafter transcribed by me, the above and foregoing pages, numbered 1 to 10, inclusive, constituting a true, perfect and complete transcription of my stenographic notes, and that the signature of the witness to the said deposition was waived by counsel for the respective parties; that there were present at such examination the Hon. Edwin E. Dunaway, attorney for the plaintiffs and Hon. Billy Joe Davis, attorney for the defendants.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this 25th day of June, 1959.

/s/ SCRIVNER MIZELL
Scrivner Mizell
Notary Public, Pulaski County, Arkansas. My Commission expires 12/2/61.

[fol. 164] EXHIBIT NO. "4"

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

TO ALL TO WHOM THESE PRESENTS SHALL COME—GREETINGS:

WHEREAS, conditions exist that in my judgment and in my opinion, seriously endanger public education in the State of Arkansas, and the peace and tranquility of the citizens of this State; and

WHEREAS, I have determined that this is an extraordinary occasion, making it necessary to call the General Assembly into extraordinary session;

NOW, THEREFORE, I, Orval E. Faubus, Governor of the State of Arkansas, by virtue of the power and authority vested in me by the Constitution of the State, Article 6, Section 19, do hereby call an Extraordinary Session of the General Assembly to convene at the seat of the government in the State Capitol on Tuesday, August 26, 1958, at eleven o'clock in the morning, and I hereby specify the purposes for which the General Assembly is convened to be the following:

To consider and, if so advised, enact laws for the following purposes:

1. To regulate the administration and financing of public schools and education, and to make appropriation for such purposes.

2. To make appropriation to pay the expenses and per diem of this Ex-

traordinary Session of the General Assembly.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed. Done in office in the City of Little Rock on this 23rd day of August, 1958.

/s/ ORVAL E. FAUBUS
Governor

/s/ C. G. HALL
Secretary of State

[fol. 165] EXHIBIT No. "5"

STATE OF ARKANSAS

DEPARTMENT [Emblem] OF STATE

C. G. HALL, SECRETARY OF STATE

To All to Whom These Presents Shall Come, Greeting I, C. G. Hall, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

Address of Governor Orval E. Faubus, Delivered to the Second Extraordinary Session of the General Assembly August 26, 1958. As reflected by the House Journal, pages 5 through 11, of the Second Extraordinary Session, 1958.

[Seal] In Testimony Whereof, I have hereunto set my hand and affixed my official Seal Done at office in the City of Little Rock, this 22nd day of May 1959.

/s/ C. G. HALL
Secretary of State

By .....
Deputy

[fol. 166] The Committee escorted the Governor to the House Chamber. The President of the Senate introduced the Governor of Arkansas, the Honorable Orval E. Faubus.

ADDRESS BY GOVERNOR ORVAL E. FAUBUS TO THE SECOND EXTRAORDINARY SESSION OF THE SIXTY-FIRST GENERAL ASSEMBLY

DATED AUGUST 26, 1958:

FOR PRESS RELEASE 11:30 A.M., AUGUST 26, 1958

Governor Gordon, Mr. Speaker, Gentlemen of the 61st General Assembly, in Extraordinary Session assembled,

My fellow citizens—

As I have said many times in awarding Arkansas Traveler Certificates to people who had distinguished themselves in public service, with every honor goes responsibility, with every privilege goes burdens.

This is one of the times when we, who have been honored by our fellow citizens by our election to public office, feel more heavily the responsibilities and the burdens that go with the public trust, than we do its honors and privileges.

But he who cannot carry the load through the storm, deserves little the bouquet in the sunshine.

We are here today, not through our own choice and desires, but because it is our responsibility to face up to some problems that have been forced upon us, by the unwise actions of others.

I quote from a news story of last Saturday and Sunday, because it has a definite relation to the cause which brings us here today.

"The Supreme Court has been usurping the rights reserved to the States by the Constitution."

"The Supreme Court has been making hasty, impatient decisions without proper judicial restraint."

"Recent decisions raise considerable doubt as to the validity of the American boast that we have a government of laws and not of men."

"The development of immense power of the Supreme Court in both state and national affairs, is second only to the increasing dominance of the national government."

"It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for."

These are not my words, nor the words of State Senator Jerry Screeton or U.S. Senator John L. McClellan, nor of any particular States' Rights advocate. These words are in the report, adopted only last Saturday by a conference of Chief Justices of the State Supreme Courts. These eminent jurists represent all the states and two territories. This unprecedented report, strongly condemn-[fol. 167] ing the United States Supreme Court in the language I have quoted above, was adopted by thirty-six favorable votes,—four and one-half times as many as the eight opposing votes.

The resolution said also:

"This conference (of State Supreme Court Chief Justices) hereby respectfully urges that the Supreme Court of the U.S., in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and state powers—exercise one of the greatest of all judicial powers—the power of judicial self-restraint."

Let us see how this admonition fits the recent majority decision of the Eighth Circuit U.S. Court of Appeals. From that decision, I quote the following language:

"From the practically undisputed testimony of the Boards' witnesses, we find that * * * the continued attendance of the Negro students at Central High School was achieved throughout the 1957-1958 school year by the physical presence of federal troops * * *

"It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals, the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of Southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock that the Brown decisions do not truly represent the law, and that by virtue of the 1956-1957 enactments, heretofore outlined, integration in the public schools can be lawfully avoided."

". . . In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them;' here, however, as pointed out by the board in its brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

"Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the District, disrupting of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances."

[fol. 168] "Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock."

"Accordingly, the order of the District Court is reversed, with directions to dismiss the appellee's petition."

What, then, is the substance of this ruling?

It means that to the court, integration is paramount to all other considerations.

1. That it is paramount to the purpose for which schools are established—that of educating our children. Even though education in the schools be seriously impaired, or utterly destroyed, still integration must prevail.

2. The sociological factors, upon which the original Supreme Court decision was based, have been, or will be, on youngsters who attended school last year under the conditions described? Did the illegal use of federal troops to break a custom of three hundred years standing, create such disrespect for authority in the minds of some students, that they will have less regard for all law and authority in the future?. The implications of harm to the students in this respect are almost numberless and, of course, impossible to calculate.

3. There is the matter of a rule of law that is applicable to every government that has ever existed—that the maintenance of peace and good order in time of crisis becomes and is paramount to all other rights and considerations. To my knowledge, this basic duty and law of governments everywhere, has never, until recent times, been challenged by any court.

This basic rule of law was disregarded by the decisions of Federal Judge Davies last fall, and by the recent ruling of the Eighth Circuit Court of Appeals in upsetting the

wise and judicious decision of Federal Judge Lemley. According to Judge Davies and the Eighth Circuit Court, it matters not how bad the conditions that may exist; it matters not if a hundred people are slain in the streets of the corridors of a school; it matters not how great the destruction of property; it matters not whether the parents know that their children may return home greivously wounded because of disorders, or whether they may return at all. Integration is paramount to these considerations.

To these extreme views, I cannot subscribe. I now quote from a statement made by me last September:

> "Maybe Negro leaders and white integrationist leaders, and even Federal Judge Davies, are willing to sacrifice the lives of a certain number of people in this community in order to take one more step toward final and complete integration of the schools. Let that be their philosophy—it is not mine. The price is too high, and the danger too great."

I do not challenge the right of the NAACP to attempt to bring about total and complete integration of the races. Regardless of whether it is good or bad for them, or for [fol. 169] others, they still have that right.

As evidence of my good faith in my attitude expressed toward peaceful integration according to the will of the people, I cite again the following from a previous statement by me:

> "The integration of all forms of transportation in Arkansas."
>
> "The integration of institutions of higher learning, including the University of Arkansas, the School of Medicine (Medical Center in Little Rock), and five state-supported colleges."
>
> "The peaceful integration of more public schools in Arkansas, than have been integrated in seven other Southern States combined, including the so-called moderate States of North Carolina, Tennessee, and Florida."

"The placing of Negroes in party posts, and also public positions, both elective and appointive."

These steps, along with other peaceful progress in the field of integration, should prove to anyone and everyone, that whatever the term, "deliberate speed" may mean, Arkansas has attained it more quickly, or approached it more closely, than any other state with a comparable problem.

My disagreement is with the methods now being employed, and the unseemly haste that is being demanded.

There is a law of life that can never be violated, or hurried, without great harm to all concerned, and that is the law of evolution in relation to social and political change. An excellent example is the long struggle to gain the right of franchise for all people of this republic. It lasted from the founding of the English Colonies until the granting of woman sufferage in 1920. It is significant that it came by the adoption of a Constitutional Amendment by the states, and not by a federal Court decree.

Chief Federal Judge Gardner aptly phrased this rule in his memorandum of dissent to the Court of Appeals ruling when he wrote:

"Such changes, if successful, are usually accomplished by evolution rather than by revolution, and time, patience, and forbearance are important elements in effecting all radical changes."

Judge Gardner further stated:

"The action of Judge Lemley was based on realities and on conditions, rather than on theories."

The case for peaceful, evolutionary progress in the field of social change, as opposed to change by law, court edict, or force, was most clearly and concisely stated by the great writer, Dorothy Thompson, in a column dated New York, September 11, 1957:

"For no law can operate to achieve its desired ends if it runs counter to the existing state of consciousness

and conscience of the community. A law to be effective must be respected. To be respected, the overwhelming majority must believe it to be right. Respect is not created by statute. No one can respect what he firmly believes to be wrong. Where a law is in harmony with public standards, its upholders (the police) find allies in the people. Where the law is not thus in harmony, the police appear as public enemies. Then *peaceable enforcement becomes impossible.*

"If a Negro child has to fight his way into a White school, the opposite situation has been created, and [fol. 170] White and Negro alike, each reflecting the feelings of the adult communities from which they come, are educated in hatred and feelings of aggression. What good does 'the protection of the law' do a child who is scorned and ostracized by his mates?" . . .

And I may add to this quotation, that there is no clear cut federal statute regarding the integration of schools. If there were, it would be unconstitutional, for the authority to control public education has never been delegated by the states to the federal government. It must be remembered that the federal government is a creature of the states and possesses only those powers delegated to it by the states.

Surely Judge Gardner drew upon all the wisdom of his many years of experience when he penned this summary of our problem, coupled with his admonition for caution:

"For centuries there had been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established cherished practice could not suddenly be changed without resistance."

Last September when I acted to preserve the peace and domestic tranquility in the Little Rock area, I charted my course on the law as declared by one of the most eminent and respected men to ever serve on the United States Supreme Court—Justice Oliver Wendel Holmes. Almost fifty years ago, in the case of Moyer v. Peabody, (53 L. ed. 411) he reviewed the duty of a governor to maintain the peace in his state, and this is what that great judge had to say on the subject:

> "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

With this background, and the tense uneasiness, deep concern, and genuine fear that exists in this community and state at this time, we come to the immediate problem. The problem is how to preserve the peace and prevent the disorder and violence, which appears certain to occur with the forcible integration of the Little Rock school.

The NAACP objective of the moment is the successful integration of Central High School by any means, including force. However, the plan already approved by the Board and the Federal Court, calls for the compiete integration of all Little Rock schools. In the recent conference with the school board and the superintendent, it was stated that there was no target date for the integration of Hall High, but the plan calls for its integration. All Little Rock schools will be integrated, and in the near future, East Side Junior High, now all white, will be integrated with approximately fifty percent Negro student and fifty percent white students.

This information was obtained from the superintendent, the three school board members present, and their attorneys, and received by me, two of my attorneys, and Lt. Governor Nathan Gordon, President Pro Tem of the Senate, Lee Bearden, and Speaker of the House, Glenn Walther. [fol. 171] To preserve the peace, prevent disorder and violence, and retain for the citizens of our state, the basic

right to control our own affairs through the democratic processes, I recommend to the members of the House and Senate, for your consideration the following measures:

A measure providing for the closing of a school or schools, for any of the following reasons:

FIRST: In order to maintain the peace against actual or impending violence which endangers the citizens, students, teachers, and others, and to provide for the safety of buildings and property.

SECOND: Where a school or schools has been ordered to integrate by any court, and federal force is employed on or about the grounds to enforce the order.

THIRD: Whenever it is determined that a general suitable and efficient educational system cannot be maintained in any school district because of the integration of the races.

This measure also provides for the calling of an election within thirty (30) days after the closing of any school for any of the above reasons. At the election, the people of the district may vote on the question of keeping the school segregated or integrated. The election would be held in the usual manner by the same officials as would hold other school elections.

If the people of the district vote to integrate the school, it will be opened on an integrated basis, otherwise it will be kept closed, and other provisions must be found for the education of the children who would otherwise attend such school.

A measure to provide for the withholding of certain state funds from any school closed under the provisions of the Act. This act also provides for each child's proportionate share of school funds to follow the student to any other school in this state in which he may choose to enroll. This can be another school within the district, a school in another district, or a private non-profit school. This measure will not change in any way, the method now used in allocating state funds or the funds of any school district under the Minimum Foundation Program Law.

A measure which provides for the enrollment and attendance of a student in any other school in the same district, or the school of another district, under certain conditions.

A measure which provides that no student shall ever be denied the right to enroll in and receive instruction in any course in any public school in the state by reason of his or her refusal to attend classes with a student of another or different race.

A measure which provides for an appropriation for the Chief Executive in the carrying out of his duties under this program, and to defray the expenses of school district elections called by the Governor.

A measure which provides for the postponement of the opening date of certain high schools from September 2 to September 15.

Gentlemen may I say to you in the deepest humility and sincerity that it is with exceeding regret that I have determined this extraordinary session of the Legislature to be necessary.

We must do whatever is possible to protect the rights of our people, and preserve for them and their posterity, the democratic processes of government which we all cherish so much.

This battle for States' Rights and Constitutional Government is not of our choosing, as has been the case many times in the history of the past; the issue has been forced [Vol. 172] upon us and we must either choose to defend our rights against those who would usurp them, or else surrender.

We, as public servants, elected by the vote of our people, would be unworthy of the confidence reposed in us, and of the honor bestowed upon us, should we be unwilling to face the issues as free men should, and do everything in our power that is possible to be done.

I hope that no one of you will be influenced by the words of the weak and the fearful, and that no one of you will be misled by the mistaken views of those who would surrender all the rights and privileges we have enjoyed, to an all powerful federal government in the unwise course

of action which it pursues at the present moment. The issues which must be faced and decided by free men have never been easy, and the tasks which must be performed by a people who would remain free, have always been difficult.

This is not a half serious problem, and it cannot be met with have measures. The bills I have recommended to you are the product of many fine and able minds, and represent a great deal of hard work. I ask that you consider these measures as a package program.

And now, in conclusion, to you, as men of responsibility and good judgment, I leave these words of caution:

Any remark on the floor of either the House or Senate during your deliberations, will be charged to some extent, to the people of our state. I would, therefore, caution you to be both delib ate and circumspect in your remarks and actions. It is not a time for gestures and posturing, and but rather a time for calm and deliberate speech and action.

The eyes of the nation are upon us; and the hopes, and the prayers of millions of our fellow citizens of our sister states are with us in our efforts.

With deep and abiding faith in our Creator, and in the people of this republic, I recall these words from our National Anthem:

Then conquer we must, for our cause, it is just: And this be our motto, "In God is our trust".

The Committee previously appointed escorted the Governor from the House Chamber.

The President of the Senate declared the Joint Session adjourned at 12:20 P.M.

The Speaker called the House to order

HOUSE OF REPRESENTATIVES

SIXTY-FIRST GENERAL ASSEMBLY
SECOND EXTRAORDINARY SESSION

REPORT ON COMMITTEE ON RULES

We, your committee to whom was referred the question of the withdrawal of the resignation of Jack S. Oakes, representative of Woodruff County, beg leave to report that we have investigated the matter and find that there was no actual valid resignation of Representative Oakes.

We, therefore, recommend the continued service of him and find that Jack S. Oakes is the duly elected, qualified and acting representative of Woodruff County, Arkansas, and has been continuously since January 14, 1957.

Respectfully submitted,

COMMITTEE ON RULES

By: C. C. Hollenworth
Ray S. Smith, Jr.

[fol. 173]

EXHIBIT NO. "6"

STATE OF ARKANSAS

DEPARTMENT [Emblem] OF STATE

C. G. HALL, SECRETARY OF STATE

To All to Whom These Presents Shall Come, Greeting I, C. G. Hall, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

ACT NO. 10 of 1958

Second Extraordinary Session

Approved: September 12, 1958.

In Testimony Whereof, I have hereunto set my hand and affixed my official Seal Done at office in the City of Little Rock, this 25th day of June 1959.

/s/ C. G. HALL
Secretary of State

By .....
Deputy

[Seal]

[fol. 174]

Act 10 of 1958.

AN ACT TO PROVIDE ASSISTANCE IN THE ADMINISTRATION AND FINANCING OF PUBLIC SCHOOLS, AND TO REQUIRE AFFIDAVITS FROM ADMINISTRATIVE AND PROFESSORIAL EMPLOYEES, INCLUDING SUPERINTENDENTS, PRINCIPALS, AND INSTRUCTORS OF THE ELEMENTARY AND SECONDARY SCHOOLS, AND COLLEGES AND UNIVERSITIES OF THE STATE OF ARKANSAS RELATIVE TO ALL INCORPORATED AND/OR UNINCORPORATED ASSOCIATIONS AND ORGANIZATIONS TO WHICH THEY HAVE BELONGED OR HAVE BEEN AFFILIATED WITH FOR THE PAST FIVE YEARS; TO PROVIDE PENALTIES FOR FAILURE TO COMPLY, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

SECTION 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by [fol. 175] the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has

been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

SECTION 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS)
COUNTY OF .....)

I, (name of affiant), being an applicant for the position of ..... at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(names and addresses of organizations)

and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(names and addresses of organizations)

.....
Signature of Affiant

Subscribed and sworn to before me this ..... day of ....., 19.....

.....
Signature and Title of Official

SECTION 4. Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in

Office Supreme Court, U.S.
FILED
MAY 6 1960
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term 1959

No. ~~917~~ 83

MAX CARR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, ... Petitioner

v.

R. A. YOUNG, *et al*, ... Respondents

ERNEST T. GEPHARDT, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, ... Petitioner

v.

EVERETT TUCKER, JR., *et al*, ... Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

EDWIN E. DUNAWAY

Tower Building
Little Rock, Arkansas

Attorney for Petitioners

May 4, 1960

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
OPINION OF COURT BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	9
A. The Constitutionality of Act 10 is a Matter of Vital Concern to the Academic Community throughout the South and the Nation	10
B. The Decision Below Conflicts with Applicable Decisions of this Court and Applies Others in a Fashion and Situation Never Intended by this Court	12
C. This Petition Raises Issues Similar to Those Already Pending before the Court	17
CONCLUSION	19
APPENDIX	21

CITATIONS

CASES

	PAGE
Adler v. Board of Education, 342 U.S. 485	13
American Communications Association v. Douds, 339 U.S. 382	16
Barenblatt v. United States, 360 U.S. 109	14
Bates v. City of Little Rock, 361 U.S. 516	11,12,16
Beilan v. Board of Education of Philadelphia, 357 U.S. 399	13
Brown v. Board of Education, 347 U.S. 483	7,17
Cooper v. Aaron, 257 F. 2d 33 (8th Cir., 1958)	7,9
Garner v. Los Angeles Board of Public Works, 341 U.S. 716	13
Lerner v. Casey, 357 U.S. 468	13
N.A.A.C.P. v. Alabama, 357 U.S. 449	11,12,13,16
Scull v. Virginia, 359 U.S. 344	11
Shelton v. McKinley, 174 F. Supp. 351 (E.D. Ark. 1959)	17
Slochower v. Board of Education, 350 U.S. 551	13
Sweezy v. New Hampshire, 354 U.S. 234	12,13
Thomas v. Collins, 323 U.S. 516	13
Watkins v. United States, 354 U.S. 178	12,16
Wieman v. Updegraff, 344 U.S. 183	13

MISCELLANEOUS

3 Race Rel. L.Rep. 1037 (1958)	10
Report of the United States Commission on Civil Rights 233 (1959)	10
46 AAUP Bulletin 19 (1960)	11

SUPREME COURT OF THE UNITED STATES

October Term 1959

No.

MAX CARR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, Petitioner

v.

R. A. YOUNG, *et al*, Respondents

ERNEST T. GEPHARDT, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, Petitioner

v.

EVERETT TUCKER, JR., *et al*, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Max Carr and Ernest T. Gephardt, petitioners, pray the Court to issue a writ of certiorari to review the decision of the Supreme Court of Arkansas in the cause styled *Max Carr, et al* v. *R. A. Young, et al* and the order denying the petition for rehearing therein and for cause show:

Opinion of Court Below

The decree of the Chancery Court of Pulaski County, Arkansas (R.75), is unreported.

The decision of the Supreme Court of Arkansas affirming this decree is not yet reported in the official reports but appears in the unofficial reports in 331 S.W. 2d 701. A copy of said opinion appears in the appendix at

page 21. The petition for rehearing in the Supreme Court of Arkansas was timely filed on February 16, 1960 (R.178). A copy of said petition appears in the appendix at page 28. Rehearing was denied by the Supreme Court of Arkansas on February 29, 1960 (R.180).

Jurisdiction

The decision of the Arkansas Supreme Court affirming the decree of the Pulaski County Chancery Court was rendered and judgment was entered on February 8, 1960.

The date of the order denying the petition for rehearing was February 29, 1960.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257(3).

The federal questions sought to be reviewed were raised in the original complaints (R.10,62) and were presented and argued in the brief, oral argument and petition for rehearing (R.178) before the Supreme Court of Arkansas, which affirmed the Chancery Court decree sustaining the validity of the statute in question against the allegations that it is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Arkansas by statute requires all educational personnel in public schools and institutions of higher learning to file annually an affidavit listing without limitation every organizational membership and regular contribution made for the past five years. The Arkansas Supreme Court construed this to require disclosure of membership in "a nudist colony", in "a drag-racing club", in "an association of atheists" and in "other organizations that

might be listed almost without number". The organizational membership and contribution affidavit must be filed with the appropriate school governing body which is free to disclose the contents generally. The question presented is whether this statute on its face and as applied to a University music professor and a high-school vocational printing instructor (who have filed non-communist disclaimers), unconstitutionally deprives them of rights of speech, press, association, religion and academic freedom guaranteed by the Fourteenth Amendment.

Statute Involved

"Act 10 of the Second Extraordinary Session of 1958 of the General Assembly of Arkansas"

AN ACT TO PROVIDE ASSISTANCE IN THE ADMINISTRATION AND FINANCING OF PUBLIC SCHOOLS, AND TO REQUIRE AFFIDAVITS FROM ADMINISTRATIVE AND PROFESSORIAL EMPLOYEES, INCLUDING SUPERINTENDENTS, PRINCIPALS, AND INSTRUCTORS OF THE ELEMENTARY AND SECONDARY SCHOOLS, AND COLLEGES AND UNIVERSITIES OF THE STATE OF ARKANSAS RELATIVE TO ALL INCORPORATED AND/OR UNINCORPORATED ASSOCIATIONS AND ORGANIZATIONS TO WHICH THEY HAVE BELONGED OR HAVE BEEN AFFILIATED WITH FOR THE PAST FIVE YEARS; TO PROVIDE PENALTIES FOR FAILURE TO COMPLY, AND FOR OTHER PURPOSES.

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be

beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

SECTION 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

SECTION 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS)

COUNTY OF .....)

I, (name of affiant), being an applicant for the position of ..... at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(Names and addresses of organizations)

and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(Names and addresses of organizations)

.....

Signature of Affiant

Subscribed and sworn to before me this ..... day of ....., 19.....

.....

Signature and Title of Official

SECTION 4. Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action

shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

Approved: September 12, 1958

Statement of the Case

Prior to the reopening of Arkansas schools in the fall of 1958, and immediately following the decision of the United States Court of Appeals for the Eighth Circuit in *Cooper* v. *Aaron*, 257 F. 2d 33, concerning desegregation of the public high schools in Little Rock, Arkansas, the Governor of the State of Arkansas in August, 1958, called a Second Extraordinary Session of the General Assembly for the purpose of enacting anti-desegregation legislation (R.166).

At this session a number of measures were enacted to achieve the overall purpose of non-compliance with the decision in *Brown* v. *Board of Education*, 347 U.S. 483. One of these measures enacted was Act 10, the validity of which is here in issue. This statute provides that no person shall be employed in a teaching capacity in any public school or public institution of higher learning in the State of Arkansas unless he shall have executed an affidavit to be filed with appropriate school officials listing all organizations with which he has been associated through membership or contribution for the past five years. A new affidavit is required to be executed each year. Any contract entered into by a school governing board with a teacher who has not executed the required affidavit is made void, and no such teacher can be paid any compensation for services from public funds. Under the Act, the execution of a false affidavit constitutes perjury, with a penalty provided therefor of loss of teaching license and the imposition of a fine of from $500 to $1,000.

Petitioner Max Carr was an associate professor of music who had been on the faculty of the University of Arkansas since the fall of 1955. No question had ever been raised by the University administration as to his qualifications to continue teaching except his refusal to

execute the affidavit required by Act 10 (R.81). Indeed, the President of the University testified that but for the requirements of Act 10, Carr's teaching services would be continued and were very much desired by the University (R.99).

Petitioner Ernest T. Gephardt had been a vocational printing instructor at Central High School in Little Rock since August, 1957. No school authorities had ever criticized Gephardt's qualifications to continue teaching (R. 111). The Superintendent of Schools of Little Rock testified that Gephardt's reemployment was recommended by his principal and but for the requirements of Act 10 his employment as a teacher would be continued (R.129).

Respondents are charged with the duty of employing teaching and supervisory personnel in a public institution of higher learning and in a public school system. The responsibility for enforcement of Act 10 is placed upon them and each has required the filing by all teaching personnel of the affidavit required by Act 10 as a condition of employment.

On June 10, 1959, petitioner Carr, recognizing that there are legitimate areas of inquiry by school authorities into the activities and associations of teachers, executed an affirmation (he being conscientiously opposed to taking an oath or swearing in any form) in which he listed his membership in professional organizations; denied ever having been a member of any subversive organization; and offering to answer any questions which the University authorities might constitutionally ask touching upon his qualifications to continue as a teacher (R.82).

A similar affidavit was executed by petitioner Gephardt and filed with the Little Rock School Board on May 4, 1959 (R.67,110). No question was ever raised as to his associations or activities (R.111).

Subsequently, both petitioners were informed that their non-compliance with Act 10 rendered their continued employment as teachers impossible. The suit by petitioner Carr was instituted on June 10, 1959, against the Board of Trustees of the University of Arkansas, the President of the University and the Attorney General of Arkansas. The action by petitioner Gephardt was instituted on June 19, 1959, against the Little Rock Special School District and its Board of Directors, the Superintendent of Schools of Little Rock and the Attorney General of Arkansas.

Both suits for declaratory judgments that Act 10 is unconstitutional and for injunctive relief against its enforcement were instituted as class actions in accordance with Arkansas law and, since the issues were the same in both cases, they were consolidated for hearing on June 25, 1959, by the trial court and were treated as consolidated cases by the Supreme Court of Arkansas on appeal.

Reasons for Granting the Writ

The Writ Should Be Granted Because the Decision of the Arkansas Supreme Court Denies Petitioners Important Constitutional Rights, Raises Federal Questions of Vital Importance to the Academic Community Throughout the South and the Nation, Conflicts With Applicable Decisions of This Court, and Raises Issues Similar to Those Now Pending Before This Court

Act 10 was enacted as part of a "package" in the Second Extraordinary Session of the Arkansas General Assembly of 1958, called by Governor Faubus following the decision by the Eighth Circuit Court of Appeals reversing the District Court order postponing integration in Little Rock's Central High School. *Cooper* v. *Aaron*,

257 F. 2d 33 (8th Cir. 1958). The Governor's Proclamation recited that "conditions exist that in my judgment and in my opinion, seriously endanger public education in the State of Arkansas, and the peace and tranquility of this State". 3 Race Rel. L. Rep. 1037 (1958). The Governor told the opening session of the Legislature that "The NAACP objective of the moment is the successful integration of Central High School . . . This is not a half serious problem, and it cannot be met with half measures. The bills I have recommended to you are the product of many fine and able minds, and represent a great deal of hard work. I ask that you consider these measures as a package program." Id. at 1041-2 (R.166).

Teaching appointments throughout Arkansas are for a one-year term, and Act 10 requires that teachers, and applicants for teaching positions, file annually an affidavit disclosing all organizational memberships and regular organizational contributions for the past five years. These affidavits are filed with each school governing authority, which is free to give them broadscale publicity.

A. The Constitutionality of Act 10 is a Matter of Vital Concern to the Academic Community throughout the South and the Nation

"The *Brown* decision shattered previous court precepts but not the South's belief in segregation. Belief begat the will to resist." *Report of the United States Commission on Civil Rights* 233 (1959). "Interposition", impeachment resolutions, school-closing, public education by private institutions, and champerty laws, are some of the techniques utilized to resist the efforts by Negroes and interested citizens to end a segregated system of public education. One such device, *exposure*, has been widely utilized throughout the South to ham-string the effectiveness of the organizations dedicated to effectuation of this

Court's decision in *Brown*. Tax proceedings against the NAACP with the demand for the membership lists is one form of known exposure. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, and *Bates* v. *City of Little Rock*, 361 U.S. 516. State legislative investigation committees with power to subpoena NAACP members and sympathizers is another form of known exposure. See *Scull* v. *Virginia*, 359 U.S. 344. The device in issue here, i e. to require all teachers to list their organizational memberships and contributions is another route to the same destination—emasculation of any group favoring compliance with this Court's decision in regard to desegregation in public schools.

Should the decision below stand, it is readily apparent that other states in the South would follow this lead. The consequence to the Southern teacher is disaster. Either he leaves the South as did some Arkansas professors, see *Aid to the Arkansas Professors*, 46 *AAUP Bulletin* 19 (1960), or he remains in the South without engaging in thought; for thinking leads to action, and in this day and age, action leads to organizational membership and support. We have emphasized the impact of the decision below on the Southern teacher, but the impact on organizations anywhere in the nation which rely on teachers for intellectual guidance and financial support, and the impact on students generally, is of equal significance.

Making available information which might indicate that members of the teaching profession favor compliance with the law of the land is not a legitimate end of legislation. The proper purposes of academic freedom and individual constitutional rights may have to accomodate themselves to the compelling interests of national security, but they should not be subordinated to such ingenuous attempts to subvert the law.

The proper function of schools, colleges and universities is to teach, not only familiar facts, but also to extend the boundaries of knowledge and to develop the intelligence and mental power of youth. To accomplish this a high degree of freedom of research, of teaching, of learning and of association for these purposes are indispensable.

This was recognized by this Court in *Sweezy* v. *New Hampshire*, 354 U.S. 234, where the Court said, at p. 250: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

B. The Decision Below Conflicts with Applicable Decisions of This Court and Applies Others in a Fashion and Situation Never Intended by this Court

The decision below—that the State can annually force teachers to disclose, without any assurance of confidentiality, religious, political, fraternal, social, recreational, and every other kind of association—conflicts with applicable decisions of this Court. *Bates* v. *City of Little Rock*, *supra*; *N.A.A.C.P.* v. *Alabama*, *supra*; *Watkins* v.

United States, 354 U.S. 178; *Sweezy* v. *New Hampshire*, *supra*; *Wieman* v. *Updegraff*, 344 U.S. 183; *Thomas* v. *Collins*, 323 U.S. 516. As stated in *N.A.A.C.P.* v. *Alabama*, *supra*, at p. 462: "'A requirement that adherents of particular religious faiths or political parties wear identifying arm bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

The Arkansas Supreme Court based its decision upon the cases decided by this Court that some inquiry may be made into the past associations and activities of public employees generally and teachers specifically. See *Adler* v. *Board of Education*, 342 U.S. 485; *Garner* v. *Los Angeles Board of Public Works*, 341 U.S. 716; *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399; *Lerner* v. *Casey*, 357 U.S. 486; *Slochower* v. *Board of Education*, 350 U.S. 551.

In its opinion the court below said:

> "In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or

hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10."

The Arkansas Court's reliance on this Court's decisions in *Adler, Garner, Beilan, Lerner* and others is entirely misplaced. The results in those cases were reached by balancing the dangers of forced disclosure against the evils of communism and justified by compelling public necessity. See *Barenblatt v. United States*, 360 U.S. 109. The Court below made no effort to "balance" the interest of private societal relationships against the necessity for state information. Indeed, such a balancing could only have resulted in a ruling for the individual, as here petitioners had already filed non-communist affidavits and their supervisors—the President of the University of Arkansas and the Superintendent of Schools of Little Rock—had testified that their services were satisfactory and their continued services very much wanted.

In sustaining the validity on its face of Act 10, the Arkansas Supreme Court recognized that its use in a discriminatory manner might make the statute invalid in application. It was argued by respondents that there is no infringement of petitioners' rights, since Act 10 does not provide for any automatic dismissal because of any organization to which petitioners may have belonged or to which they may have contributed. It is true that the Act does not provide for such automatic dismissal, nor are any particular organizations proscribed. It is equally true, however, that the Act does not provide that the affidavits filed or the information contained therein should be held in confidence by the school authorities with whom the affidavits are filed. Consequently, any school governing body on its own or when subjected to public pressure, may well make public such affidavits in whole or in part.

A representative of the Capital Citizens Council, an organization dedicated to non-compliance with this Court's decisions in regard to school desegregation, testified that his organization would seek to obtain information in regard to organizations to which teachers belonged and would attempt to have discharged teachers who had supported organizations unpopular with the Citizens Councils (R.148). Among such organizations were named The American Civil Liberties Union, The Urban League, and the American Association of University Professors (R.151).

In commenting on this testimony and the use to which the information obtained through the Act 10 affidavits would be put, the Arkansas Supreme Court said:

> "The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the State meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.
>
> "We do not think this testimony sufficient to show that the Act will be applied by the State and its agencies in such a way as to violate the appellants' constitutional rights."

Here again we submit that the court below fell into error in assuming that direct action by a State agency under a challenged statute is necessary to the invalidity of such statute.

This Court has frequently recognized that an indirect restraint upon the exercise of constitutional rights may be just as effective and invalid as a direct one. See *N.A.A.C.P.* v. *Alabama, supra; American Communications Association* v. *Douds*, 339 U.S. 382; *Watkins* v. *United States, supra; Bates* v. *City of Little Rock, supra.*

It is clear then that a statute which compels disclosure of associations may be unconstitutional without further direct governmental action of a punitive nature, if the governmentally forced disclosure sets in motion private action which has the effect of depriving one of his constitutional rights. The crucial factor is the interplay of governmental and private action. *N.A.A.C.P.* v. *Alabama, supra.*

As already pointed out, Act 10 makes no requirement that the information contained in the affidavits required to be filed be kept confidential. Bruce Bennett, the Attorney General of Arkansas, on April 21, 1959, issued an official opinion to the Little Rock School Board, holding that disclosure of information contained in the affidavits is in the discretion of each governing school body (R.163). This feature of Act 10 alone distinguishes this case from *Beilan, supra,* where the Court pointed out in its opinion, at p. 401, that the interviews with the superintendent "were given no publicity and were attended only by petitioner, his superintendent and the assistant solicitor of the board".

Ostensibly Act 10 was passed for the purpose of providing assistance in the administration and financing of the public schools of Arkansas and institutions of higher

learning supported by public funds. Section 1 of the Act so declares and further makes a determination that it will be beneficial to the schools if affidavits as required by the Act are provided.

Section 7 of the Act, the emergency clause, comes closer to a statement of the real purpose for which this legislation was enacted. That section reads: "It is hereby determined that the decisions of the United States Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately, and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this Act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

The purpose here is scarcely veiled. It is implicit in the language of Section 7 that the purpose of the Act is to resist compliance with *Brown* v. *Board of Education*, *supra*. If this is the purpose, and there can be no reasonable doubt on this score, then the interest of the State is not only less than compelling, it is itself unlawful.

C. This Petition Raises Issues Similar to Those Already Pending Before the Court

There is now on appeal to this Court another case, which arose in the Federal District Court for the Eastern District of Arkansas, challenging the validity of Act 10, *Shelton, et al* v. *Ed I. McKinley, Jr., et al*, 174 F. Supp. 351, decided June 8, 1959, by a three-judge court which upheld the constitutionality of the Act.

Although the basic questions of the constitutionality of Act 10 are similar in both cases, petitioners feel that there are substantial differences in the records which would make a consideration of both cases helpful to the

Court in properly determining the grave constitutional issues presented. In the *Shelton* case, the plaintiff took the position that it was beyond the power of the State to require him to supply any information as to his associations, and consequently he declined to do so.

Petitioners, on the other hand, recognized the right of school authorities to make some inquiry into their past and present associations as they might be relevant to and affect their character and fitness as teachers. Petitioners' contention, however, is that the Act goes beyond what the State may constitutionally compel in the way of disclosure of associations and activities.

There is also in the record of this case testimony showing the uses to which the Act is sought to be put and the actual intimidation of teachers in the exercise of their right of free association which will result if Act 10 is not invalidated. Further, the record completely negates the existence of any compelling public necessity which might justify the attempted invasion of individual freedoms.

Act 10 is designated to create exactly the opposite of the essential atmosphere of freedom which must prevail in our educational institutions if they are to perform their proper function in a free democratic society. This unjustified onslaught on academic freedom and the right of free association of public school teachers goes beyond any repressive legislative scheme yet devised and presented to any American court. This Court should decide the power of the state to so infringe upon rights guaranteed by the Fourteenth Amendment.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and this Court should review the judgment of the Supreme Court of Arkansas.

Respectfully submitted,

EDWIN E. DUNAWAY

Tower Building
Little Rock, Arkansas

Attorneys for Petitioners

May 4, 1960

APPENDIX

SUPREME COURT OF ARKANSAS

CARR *v.* YOUNG

5—1978

Opinion delivered February 8, 1960.

APPEAL FROM PULASKI CHANCERY COURT—AFFIRMED

GEORGE ROSE SMITH, J. This case involves the validity of the teacher-affidavit law, Act 10 of the 1958 special session. The appeal is from a declaratory decree upholding the statute. Two suits were consolidated in the trial court. In one the appellant Carr, an associate professor of music at the University of Arkansas, acting for himself and others similarly situated, sought a decree declaring the act unconstitutional and enjoining its enforcement by the defendants, the president and trustees of the University. The other case is a similar class suit brought by the appellant Gephardt, a vocational printing instructor at Little Rock Central High School, asking for like relief against the Little Rock Special School District and its superintendent and directors. Both plaintiffs assert that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought and allied rights, all protected by the Fourteenth Amendment and by parallel provisions in the Arkansas constitution.

Act 10 provides that no person shall be employed as a teacher in any of the state's public schools or as a superintendent or principal in any elementary or secondary school without having first filed with the employing authority an affidavit giving the names and addresses of

all organizations and associations to which the applicant has belonged within the preceding five years or to which he has paid regular dues or made regular contributions within that time. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract, and fix civil and criminal penalties for the willful filing of a false affidavit.

The appellants' attack upon the act may be considered in two aspects: First, is Act 10 unconstitutional on its face? Secondly, if the act is outwardly valid, does the record show that the statute was intended to be applied, and will in fact be applied, in such a way as to deprive the appellants and those they represent of their constitutional rights?

We do not find Act 10 to be invalid on its face. By §1 of the act the legislature declared its belief that the public school system would be benefited as a result of the school authorities having the required information about applicants for the positions covered by the statute. It cannot be doubted that the information would often be of real value to the employing school board. We are not convinced that either the federal or the state constitution compels a school board to engage its teachers without first inquiring about the matters that the act requires to be disclosed.

A similar question was presented long ago, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517, where a policeman complained of a city regulation that prohibited him from soliciting money or aid for political purposes. In the familiar words of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . the city may impose any reasonable condition upon holding offices within its control."

The appellants are not entitled to demand that the University and the Little Rock school board employ them without making any inquiry about organizations to which they have belonged within a period reasonably close to the date of the application. Such investigations are the usual practice among private employers, and, as the court pointed out in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, public employers are not denied the privilege of making similar inquiries. From that opinion: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *prima facie* validity of Act 10 is pretty well settled by the holding in *Adler* v. *Board of Education of New York*, 342 U.S. 485, where the court sustained a state statute forbidding the employment in the public school system of persons belonging to organizations found to be subversive. This language in the opinion is peculiarly pertinent to the case at bar:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly

be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10.

We conclude, as did the three-judge district court in *Shelton* v. *McKinley*, D.C. Ark., 174 F. Supp. 351, that the act is not unconstitutional on its face. We do not, of course, pass upon the wisdom of the law, for as the court said in the *Shelton* case: "We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government."

There remains the contention that Act 10, even if ostensibly valid, is subject to being used in an unconstitutional manner. Upon this point the appellants offered three witnesses. Two of them, the Attorney General, whose office assisted in the drafting of the bill, and the state senator who introduced the measure in the legislature, testified that the act was intended as a weapon against subversion. Such expressions of individual opinion are not competent to show the legislative intention, *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W. 2d 1007, but even if the testimony were considered it would not create any doubt about the validity of the act.

The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.

We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state "with an evil eye and an unequal hand". *Yick Wo* v. *Hopkins*, 118 U.S. 356.

Here, however, the proof does not show any inclination on the part of any school board to use Act 10 in a discriminatory manner. The most that can be said is that at least some members of the Citizens Councils are so all-advised as to advocate that course. "Ill-advised" is the proper term, since such an effort, if successful, would defeat its own purpose by rendering the act invalid.

It is very far from certain that efforts to misuse Act 10, if any are made, will succeed. Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone. The only testimony on this point indicates that the affidavits are not being publicized; the president of the University testified that its affidavits are being treated as confidential and are being kept under lock and key.

Moreover, even if secrecy should not be observed in every instance it still cannot be surely predicted that any teacher will be eliminated from the school system. Unlike the statute upheld in the *Adler case, supra*, which mandatorily forbade the employment of persons belonging to subversive organizations, Act 10 does not affirmatively require a school board to take any action, no matter what associations an affidavit may reveal. Thus in order for us to invalidate Act 10 at this stage of its existence we should have to assume, wholly without proof, that conscientious and responsible school board members will inevitably yield to a nebulous public insistence that the act be applied discriminatorily and in disregard of recognized constitutional guaranties. We are aware of

no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid.

Affirmed.

SUPREME COURT OF ARKANSAS

MAX CARR *et al.*,	)	
	)	
Appellants	)	
	)	
v.	)	No. 5—1978
	)	
R. A. YOUNG *et al.*,	)	
	)	
Appellees	)	

PETITION FOR REHEARING

Petitioners move that the Court grant a rehearing in captioned cause for the following reason:

The opinion is bottomed upon the erroneous premise that so long as no direct discriminatory action by public officials is based upon the compelled disclosure of associations required by Act 10, that First and Fourteenth Amendment rights of petitioners are not violated. The resultant interplay of governmental and private action set in motion by Act 10, in successfully dissuading teachers from exercising their constitutional rights, or making them targets of abuse if they do, through the publicity made possible by the Act, is ignored by the Court.

EDWIN E. DUNAWAY

Solicitor for Appellants

The admirable admonition contained in the Court's opinion against the use of Act 10 for the purpose for which it was enacted does not alter the fact that the Act makes no requirement that the information in the affidavits be treated as confidential. There is, consequently, provided by Act 10, with no necessity to justify it, the means by which teachers are subjected to the immediate possibility of publication of their past and present associations.

The United States Supreme Court recognized in *NAACP* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163, at p. 1172, that such publication must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.

That court then answered this Court's argument that whatever repressive effect resulted from compelled disclosure follows from *private*, not *state* action. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exercise of state power represented by the production order that private action takes hold," said the court at p. 1172.

In *Watkins* v. *United States*, 354 U.S. 178, 77 S.Ct. 1173, at p. 1134, the United States Supreme Court also recognized the constitutional evil of unnecessary forced revelations about possibly unpopular associations and the resultant deterrent effect upon one's exercising constitutional rights.

CERTIFICATE

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. Copies have been served upon opposing counsel by mailing same on February 16, 1960.

Edwin E. Dunaway

FILE COPY

Supreme Court, U.S.
FILED
SEP 30 1960
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 83

MAX CARR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, *Petitioner*

v.

R. A. YOUNG, *et al*, *Respondents*

ERNEST T. GEPHARDT, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, *Petitioner*

v.

EVERETT TUCKER, JR., *et al*, *Respondents*

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR PETITIONERS

EDWIN E. DUNAWAY

Tower Building
Little Rock, Arkansas

Attorney for Petitioners

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Opinion of the Court Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement of the Case	6
Summary of Argument	9
Argument	11
Conclusion	24

INDEX—(Continued)

Page

CITATIONS

Cases

Adler v. Board of Education,
342 U. S. 485 9,11,13,14,21,23

American Communications Association v. Douds,
339 U. S. 382 19

Barenblatt v. United States, 360 U. S. 109 14

Bates v. City of Little Rock, 361 U. S. 516 10,12,19

Beilan v. Board of Education of Philadelphia,
357 U. S. 399 9,11,13,23

Brown v. Board of Education, 347 U. S. 483 6,10,12,16

Cantwell v. Connecticut, 310 U. S. 296 10,21

Carlson v. California, 310 U. S. 106 21

Cooper v. Aaron, 257 F.2d 33 (8th Cir. 1958) 6,11

Cooper v. Aaron, 358 U. S. 1 16

Garner v. Los Angeles Board of Public Works,
341 U. S. 716 13,14

Lerner v. Casey, 357 U. S. 468 13

Milk Wagon Drivers Union v. Meadowmoor Dairies,
312 U. S. 287 21

	Page
N.A.A.C.P. v. Alabama, 357 U. S. 449	10,12,13,19,20
Scull v. Virginia, 359 U. S. 344	12
Shelton v. McKinley, 174 F. Supp. 351 (E.D. Ark. 1959)	22
Slochower v. Board of Education, 350 U. S. 551	13
Sweezy v. New Hampshire, 354 U. S. 234	10,13
Thomas v. Collins, 323 U. S. 516	13
Thornhill v. Alabama, 310 U. S. 88	10,21
Watkins v. United States, 354 U. S. 178	19
Wieman v. Updegraff, 344 U. S. 183	14

MISCELLANEOUS

46 AAUP Bulletin 19 (1960)	20

SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 83

MAX CARR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, *Petitioner*

v.

R. A. YOUNG, *et al.*, *Respondents*

ERNEST T. GEPHARDT, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, *Petitioner*

v.

EVERETT TUCKER, JR., *et al.*, *Respondents*

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR PETITIONERS

Opinion of Court Below

The opinion of the Supreme Court of Arkansas (R. 130-135) is not yet reported in the official reports but appears in the unofficial reports in 331 S.W. 2d 701.

Jurisdiction

The decision of the Arkansas Supreme Court affirming the decree of the Pulaski County Chancery Court was rendered and judgment was entered on February 8, 1960 (R.130,135).

The date of the order denying the Petition for Rehearing was February 29, 1960 (R.137).

The petition for certiorari was filed May 6, 1960, and was granted June 20, 1960.

The jurisdiction of this Court rests on Title 28, U.S.C. Section 1257(3).

Question Presented

Arkansas by statute requires all educational personnel in public schools and institutions of higher learning to file annually an affidavit listing without limitation every organizational membership and regular contribution made for the past five years. The Arkansas Supreme Court construed this to require disclosure of membership in "a nudist colony", in "a drag-racing club", in "an association of atheists" and in "other organizations that might be listed almost without number". The organizational membership and contribution affidavit must be filed with the appropriate school governing body which is free to disclose the contents generally. The question presented is whether this statute on its face and as applied to a University music professor and a high-school vocational printing instructor (who have filed non-communist disclaimers), unconstitutionally deprives them of rights of speech, press, association, religion and academic freedom guaranteed by the Fourteenth Amendment.

Statute Involved

"Act 10 of the Second Extraordinary Session of 1958 of the General Assembly of Arkansas"

AN ACT TO PROVIDE ASSISTANCE IN THE ADMINISTRATION AND FINANCING OF PUBLIC SCHOOLS, AND TO REQUIRE AFFIDAVITS FROM ADMINISTRATIVE AND

PROFESSORIAL EMPLOYEES, INCLUDING SUPERINTENDENTS, PRINCIPALS, AND INSTRUCTORS OF THE ELEMENTARY AND SECONDARY SCHOOLS, AND COLLEGES AND UNIVERSITIES OF THE STATE OF ARKANSAS RELATIVE TO ALL INCORPORATED AND/OR UNINCORPORATED ASSOCIATIONS AND ORGANIZATIONS TO WHICH THEY HAVE BELONGED OR HAVE BEEN AFFILIATED WITH FOR THE PAST FIVE YEARS; TO PROVIDE PENALTIES FOR FAILURE TO COMPLY, AND FOR OTHER PURPOSES.

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

SECTION 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor, professor,

or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

SECTION 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS)
COUNTY OF)

I, (name of affiant), being an applicant for position of
at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(Names and addresses of organizations)
and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(Names and addresses of organizations)

Signature of Affiant

Subscribed and sworn to before me this
day of , 19 .

Signature and Title of Official

SECTION 4. Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution

supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment, or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitution-

ality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

This law became effective on September 12, 1958.

Statement of the Case

Prior to the reopening of Arkansas schools in the fall of 1958, and immediately following the decision of the United States Court of Appeals for the Eighth Circuit in *Cooper* v. *Aaron*, 257 F. 2d 33, concerning desegregation of the public high schools in Little Rock, Arkansas, the Governor of the State of Arkansas in August, 1958, called a Second Extraordinary Session of the General Assembly for the purpose of enacting anti-desegregation legislation (Pl. Ex. 4 R.96, 112. Pl. Ex. 5 R.97, 114).

At this session a number of measures were enacted to achieve the overall purpose of non-compliance with the decision in *Brown* v. *Board of Education*, 347 U. S.

483. One of these measures enacted was Act 10, the validity of which is here in issue. This statute provides that no person shall be employed in a teaching capacity in any public school or public institution of higher learning in the State of Arkansas unless he shall have executed an affidavit to be filed with appropriate school officials listing all organizations with which he had been associated through membership or contribution for the past five years. A new affidavit is required to be executed each year. Any contract entered into by a school governing board with a teacher who has not executed the required affidavit is made void, and no such teacher can be paid any compensation for services from public funds. Under the Act, the execution of a false affidavit constitutes perjury, with a penalty provided therefor of loss of teaching license and the imposition of a fine of from $500 to $1,000.00.

Petitioner Max Carr was an associate professor of music who had been on the faculty of the University of Arkansas since the fall of 1955. No question had ever been raised by the University administration as to his qualifications to continue teaching except his refusal to execute the affidavit required by Act 10 (R.52). Indeed, the President of the University testified that but for the requirements of Act 10, Carr's teaching services would be continued and were very much desired by the University (R.62,63).

Petitioner Ernest T. Gephardt had been a Vocational Printing Instructor at Central High School in Little Rock since August, 1957. No school authorities had ever criticized Gephardt's qualifications to continue teaching (R.69). The Superintendent of Schools of Little Rock testified that Gephardt's reemployment was recom-

mended by his principal and but for the requirements of Act 10 his employment as a teacher would be continued (R.80).

On June 10, 1959, petitioner Carr, recognizing that there are legitimate areas of inquiry by school authorities into the activities and associations of teachers, executed an affirmation (he being conscientiously opposed to taking an oath or swearing in any form) in which he listed his membership in professional organizations; denied ever having been a member of any subversive organization; and offering to answer any questions which the University authorities might constitutionally ask touching upon his qualifications to continue as a teacher (R.52-53). No question was ever raised as to his associations or activities (R.53).

A similar affidavit was executed by petitioner Gephardt and filed with the Little Rock School Board on May 4, 1959 (R.68-69). No question was ever raised as to his associations or activities (R.69).

Subsequently, both petitioners were informed that their non-compliance with Act 10 would render their continued employment as teachers impossible (R.64,80). The suit by petitioner Carr was instituted on June 10, 1959, against the Board of Trustees of the University of Arkansas, the President of the University and the Attorney General of Arkansas (R.2). The action by petitioner Gephardt was instituted on June 19, 1959, against the Little Rock Special School District and its Board of Directors, the Superintendent of Schools of Little Rock and the Attorney General of Arkansas (R.33).

Both suits were instituted as class actions seeking declaratory judgments that Act 10 is unconstitutional and for injunctive relief against its enforcement (R.8,

40). Both complaints attacked the statute as depriving petitioners and the class they represent of liberty and property without due process of law, of the equal protection of the laws, and rights of speech and of association (R.7,39).

Since the issues were the same in both cases, they were consolidated for hearing on June 25, 1959, in the Chancery Court of Pulaski County, Arkansas (R.51). At the conclusion of the hearing, the Chancery Court sustained the validity of the statute (R.99). The formal decree dismissing the actions as to the Attorney General of Arkansas and upholding the constitutionality of Act 10 was entered September 22, 1959, *nunc pro tunc* as of June 25, 1959 (R.48-50).

The Supreme Court of Arkansas affirmed the decree of the Pulaski Chancery Court sustaining the validity of the challenged statute on February 8, 1960 (R.130,135).

Summary of Argument

Act 10—with its provision to annually force teachers to disclose, without assurance of confidentiality, religious, political, fraternal, social, recreational and every other kind of association—goes beyond any intrusion upon the rights of academic freedom and of free association yet approved by this Court.

It is recognized that school authorities have a right to inquire of teachers concerning matters touching upon their fitness and loyalty. *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Education*, 357 U. S. 399. The broadside requirements of disclosure under Act 10 are not designed to meet this legitimate end, but rather to create an atmosphere of fear and intimidation in which members of the teaching profession will be de-

terred from exercising their constitutional rights. As such, the statute does not meet the constitutional test of imposing the narrowest restriction on individual freedom that is necessary to meet the supposed evil. See *Cantwell v. Connecticut*, 310 U. S. 296; *Thornhill v. Alabama*, 310 U. S. 88.

Although enacted as a part of a legislative program to achieve non-compliance with the decision in *Brown v. Board of Education*, 347 U. S. 483, the effects of the Act are more far-reaching. The exact opposite of the free academic atmosphere envisioned in *Sweezy v. New Hampshire*, 354 U. S. 234, is the inevitable product of the enforcement of Act 10.

No showing of necessity in the public interest for such a sweeping invasion of the teacher's rights has been made by the State. The language of the Act itself clearly demonstrates that its real purpose is to ferret out teachers who have the temerity to favor compliance with the school desegregation cases.

Although the Act does not provide for automatic dismissal of teachers because of organizational memberships or contributions, the natural result will be that teachers will avoid currently unpopular associations in order to insure renewal of their annual contracts of employment, and in order not to be subjected to abuse and pressure from outside private groups who disapprove of any causes the teacher might espouse. Teachers are thus deprived of their rights of free association. See *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Bates v. City of Little Rock*, 361 U. S. 516.

In furnishing their administrative superiors with an affirmation and affidavit, respectively, offering to answer any questions concerning their associations and ac-

tivities which might affect their fitness for continued teaching, petitioners have complied with any requirement which the State may constitutionally make under the decisions in *Adler* and *Beilan*.

On its face and as applied to these petitioners, Act 10 should be invalidated.

Argument

Act 10 Unconstitutionally Deprives Public School Teachers of Rights of Speech, Association, Religion and Academic Freedom Guaranteed by the Fourteenth Amendment.

Act 10 was enacted as part of a "package" in the Second Extraordinary Session of the Arkansas General Assembly of 1958, called by Governor Orval E. Faubus following the decision by the United States Court of Appeals for the Eighth Circuit, reversing the District Court order postponing integration in Little Rock Central High School. *Cooper v. Aaron*, 257 F. 2d 33 (8th Cir., 1958). The Governor's Proclamation recited that "Conditions exist that in my judgment and in my opinion, seriously endanger public education in the State of Arkansas, and the peace and tranquility of this State." (Pl. Ex. 4; R. 96, 112). The Governor told the opening session of the Legislature that they were met to consider problems not of their own making but problems forced upon the State by the unwise actions of others (Pl. Ex. 5; R.97,114). Governor Faubus continued in his address: "The NAACP objective of the moment is the successful integration of Central High School . . . This is not a half serious problem, and it cannot be met with half measures. The bills I have recommended to you are the product of many fine and able minds, and represent a great deal of hard work. I ask that you consider these measures as a package program" (R.121-124).

While it is true that Act 10 was not one of the measures specifically mentioned by the Governor in his "package", it was a part of the enlarged package enacted at the same time by the Arkansas Legislature to achieve the over-all purpose of noncompliance with the decision in *Brown v. Board of Education*, 347 U. S. 483.

"Interposition", impeachment resolutions, school closing, public education by private institutions, and champerty laws are some of the techniques utilized to resist efforts at compliance with this Court's decisions in regard to desegregation in the public schools. One such device, *exposure*, has been widely utilized throughout the South to hamstring the effectiveness of organizations dedicated to effectuation of this Court's decision in *Brown*. Tax proceedings against the NAACP with the demand for the membership lists is one form of exposure. See *N.A.A.C.P. v. Alabama*, 357 U. S. 449, and *Bates v. City of Little Rock*, 361 U. S. 516. State legislative investigation committees with power to subpoena NAACP members and sympathizers is another form of known exposure. See *Scull v. Virginia*, 359 U. S. 344. The device in issue here, that is, to require all teachers to list their organizational memberships and contributions is another route to the same destination. It is simply a vehicle to be used for ending any public school teacher's participation in any group favoring compliance with this Court's decisions in regard to desegregation.

Petitioners make no contention that their rights of free association, of academic freedom and other rights guaranteed by the Fourteenth Amendment are limitless. The State may certainly make some inquiry into the past and present associations and activities of public employees generally, and teachers specifically, in order to insure

their loyalty, character, general fitness, trustworthiness and professional competence. See *Adler* v. *Board of Education*, 342 U. S. 485; *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716; *Beilan* v. *Board of Education of Philadelphia*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Slochower* v. *Board of Education*, 350 U. S. 551. But just as there are limits to the exercise of one's rights, there are limits to their permissible restriction by the State. Such permissible restrictions must be justified by some clear and present public interest. See *Thomas* v. *Collins*, 323 U. S. 516, 530; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

The proper function of schools, colleges and universities is to teach, not only familiar facts, but also to extend the boundaries of knowledge and to develop the intelligence and mental power of youth. To accomplish this a high degree of freedom of research, of teaching, of learning and of association for these purposes is indispensable. The restrictive effects of Act 10 on the individual rights of teachers is not the only issue involved. Of equal concern is the interest of the school children of Arkansas and the public generally that there be maintained a school system which is free from any unnecessary influence of fear and intimidation. The essentiality of this freedom was recognized by this Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234, where the Court said, at p. 250:

> "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the

"social sciencies where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." See also *Wieman v. Updegraff*, 344 U. S. 183.

In sustaining the validity of Act 10, the Arkansas Supreme Court based its decision upon cases decided by this Court. *Adler* v. *Board of Education*, *supra*; *Garner* v. *Los Angeles Board of Public Works*, *supra*.

In its opinion the court below said:

> "In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10."

The Arkansas court's reliance on this Court's decisions in *Adler* and *Garner* is entirely misplaced. The results in those cases were reached by balancing the dangers of forced disclosure against the evils of communism and justified by compelling public necessity. See *Barenblatt* v. *United States*, 360 U. S. 109. As in those cases, the Court is now confronted with the problem of balanc-

ing the clash between the individual teacher's rights and the State's asserted justification for the invasion of these rights under the provisions of Act 10.

What then is the public interest which is sought to be protected by the affidavit requirements of this Act?

It is stated in Section 1 of Act 10 that the purpose of the Act is to "provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds." There is also stated the legislative determination that the filing of the required affidavits of membership will be beneficial to the public schools and institutions of higher learning in the State of Arkansas. The Act contains no reference to teacher loyalty, trustworthiness, suitability, fitness or professional competence.

Section 7 of the Act, the emergency clause, comes closer to a statement of the real purpose for which this legislation was enacted. That section reads: "It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately, and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this Act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

There could be no possible legitimate connection between the solution of local school problems created by this Court's school segregation decisions and the affidavits required under the terms of Act 10. The purpose here is scarcely veiled. It is implicit in the language of

Section 7 that the purpose of the Act is to resist compliance with *Brown* v. *Board of Education*, *supra*. Hence, the purpose of the Act as declared by the Legislature itself, is one of those attempts condemned in *Cooper* v. *Aaron*, 358 U. S. 1, 17, in the following language:

> "Evasive schemes for segregation whether attempted 'ingeniously or ingenuously'."

No relationship between the asserted benefit in the administration and financing of public schools and the restrictions upon teachers' rights under the provisions of Act 10 has been shown. On the contrary the only evidence in the record shows that the requirements of Act 10 are not necessary in the proper administration and preservation of the integrity of the schools in Arkansas. The President of the University of Arkansas testified that he did not know of any school bodies, teachers' associations, or administrative heads of schools that sought the enactment of Act 10 (R.64). When asked by Attorney General Bennett whether the information called for in Act 10 would be of further value in screening applicants for teaching jobs, the President of the University answered in the negative (R.65).

In sustaining the validity on its face of Act 10, the Arkansas Supreme Court recognized that its use in a discriminatory manner might make the statute invalid in application. It was argued by respondents that there is no infringement of petitioners' rights, since Act 10 does not provide for any automatic dismissal because of any organization to which petitioners may have belonged or to which they may have contributed. It is true that the Act does not provide for such automatic dismissal, nor is membership in any particular organization proscribed. It is equally true, however, that the Act does not provide that the affidavits filed or the information contained

therein should be held in confidence by the school authorities with whom the affidavits are filed. The official opinion of the Attorney General of Arkansas to the secretary of the Little Rock School Board on April 21, 1959, stated: "It is an administrative determination, to be made by the respective boards, as to the disclosure of information contained in the affidavits." (Pl. Ex. 2; R. 56,102). Consequently, any school governing body on its own, or when subjected to public pressure, may well make public such affidavits, in whole or in part.

On April 12, 1959, state-wide publicity was given in the Arkansas Gazette, a Little Rock daily newspaper, to the fact that the Capital Citizens Council, a segregationist organization, was going to photostat copies of the affidavits filed under Act 10 at several state colleges and all of the high schools in Arkansas that have integration, with the exception of Little Rock. Little Rock was not on the list because the representative of the Citizens Council had been assured by several members of the Little Rock School Board that the records would be made public (R.11).

At the trial, Amis Guthridge, attorney for and a board member of, the Capital Citizens Council, who had made the statements publicized in the press, testified that his group would seek to obtain information in regard to organizations to which teachers belonged, and would attempt to have discharged teachers who had supported organizations unpopular with the Citizens Councils (R.91). This witness further described the Capital Citizens Council as an organization dedicated to legal non-compliance with decisions which this Court rendered in regard to school desegregation under usurped authority that it does not possess (R.88). Among such organizations unpopular with the Citizens Council were named

the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Public Schools in Little Rock (R.91,93). Guthridge further testified that within the State there is an Association of Citizens Councils of Arkansas, and that this State Association is affiliated with the Citizens Councils of America (R.87). There are approximately 40 to 50 Citizens Councils scattered throughout the State of Arkansas (R.88).

In commenting on this testimony and the use to which the information obtained through the Act 10 affidavits would be put, the Arkansas Supreme Court said:

> "The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens' Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.
>
> "We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights."

We submit that the court below fell into error in assuming that direct action by a state agency under a challenged statute is necessary to the invalidity of such statute.

This Court has frequently recognized that an indirect restraint upon the exercise of constitutional rights may be just as effective and invalid as a direct one. See *N.A.A.C.P.* v. *Alabama, supra; American Communications Association* v. *Douds*, 339 U. S. 382; *Watkins* v. *United States*, 354 U. S. 178; *Bates* v. *City of Little Rock, supra.*

It is clear then that a statute which compels disclosure of associations may be unconstitutional without further direct governmental action of a punitive nature, if the governmentally forced disclosure sets in motion private action which has the effect of depriving one of his constitutional rights. The crucial factor is the interplay of governmental and private action, *N.A.A.C.P.* v. *Alabama, supra.*

Teaching appointments throughout Arkansas are for a one year term. Local school board members are elected by the people with periodic expiration of terms, varying from district to district. The boards of trustees of the various State colleges and the University are for staggered terms, with at least one membership expiring annually.

The Arkansas Supreme Court, in commenting upon the testimony in the cases at bar that presently the information contained in the Act 10 affidavits is being held confidential, overlooked the reality of the constant threat to teachers of possible future exposure. At any moment a governing school board may change its policy or a change in personnel may result in the adoption of a policy

of publicizing teachers' associations. The record discloses that, although when these cases were tried on June 25, 1959, the Little Rock School Board was treating the affidavit information as confidential, this was not true when the Board was differently constituted on April 12, 1959 (R.11,77-78). Petitioner Gephardt's testimony makes it clear that teachers at that date had no assurance of the confidentiality of the information sought.

From the spate of litigation arising as a result of desegregation decisions in various fields, this Court is bound to take notice of the fact that resistance to compliance with ending segregation is the popular position in the South. School governing authorities know this and teachers know it as well. In this situation, the effect of Act 10 is to create a constant threat that, either immediately or at some future time, teachers' contributions to or affiliation with unpopular organizations may cause their discharge. The inevitable result is that teachers, in order to assure their continued livelihood in their chosen profession, will carefully avoid any possibly unpopular affiliations. The consequence to the southern teacher is disaster. Either he leaves the South as did some Arkansas professors, see "Aid to the Arkansas Professors", 46 AAUP Bulletin 19 (1960), or he remains in the South without engaging in thought, for thinking leads to action, and in this day and age, action leads to organizational membership and support.

Had the object of Act 10 actually been to provide needed information for the maintenance of a proper public school system, it would have been a simple matter for the Legislature to have given school authorities power to obtain such information as this Court has held to be relevant, and to have provided that such information be kept confidential, not unnecessarily disclosed. As stated in *N.A.A.C.P.* v. *Alabama*, *supra*, at p.462:

> "Inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs."

The non-confidential feature of Act 10 alone distinguishes this case from *Beilan, supra*, where the court pointed out in its opinion, at p. 401, that the interviews with the Superintendent "were given no publicity and were attended only by petitioner, his superintendent and the assistant solicitor of the board."

Making available information which might indicate that members of the teaching profession favor compliance with the law of the land is not a legitimate end of legislation. The proper purposes of academic freedom and individual constitutional rights may have to accommodate themselves to the compelling interests of national security, but they should not be subordinated to such ingenuous attempts to subvert the law.

Absent any showing that the broadscale invasion of privacy under Act 10 is necessary to meet any supposed evil sought to be corrected by the State, the Act's restrictions on academic freedom and freedom of association render it unconstitutional on its face. See *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Carlson* v. *California*, 310 U. S. 106; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287.

Even assuming that Act 10 is on its face a valid statute, as applied to petitioners it is unconstitutional. The only legitimate justification for the State to probe into the organizational memberships and contributions of public school teachers is to aid in determining their fitness to serve as teachers. In recognizing this, the Supreme Court of Arkansas in its opinion (R.132) quoted this language from *Adler* v. *Board of Education, supra*:

> "That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

The same language was also relied upon by the United States District Court in its opinion in *Shelton* v *McKinley*, 174 F. Supp. 351 (E.D. Ark.), upholding the validity of Act 10.

In the cases at bar there is no question of petitioners having refused to answer inquiries by school authorities touching upon their fitness and loyalty. Both petitioners, as has already been stated, filed statements listing the professional organizations to which they had belonged, and denying past or present membership in any subversive organization (R.52,69). They further offered to answer any questions in regard to any matter, including their associations and activities, which might be relevant concerning their qualifications to continue as teachers (R.52-53,69). No school official ever raised any question about the associations or activities of either petitioner Carr or Gephardt (R.53,69).

The President of the University of Arkansas testified at the trial that petitioner Carr's performance of duties had been in every way satisfactory and that he and other members of the administration had urged Carr to stay on the faculty (R.63). Only Carr's refusal to execute the full affidavit required by Act 10, which the President felt was not needed in screening applicants for teaching jobs (R.65), was responsible for his pending dismissal (R.52).

As to petitioner Gephardt, the Superintendent of Schools in Little Rock testified that Gephardt's reemployment was recommended by his principal, and that no complaint had been received about his teaching ability or any of his associations. But for Act 10 he would not be discharged (R.80).

In this situation, the following language in the Court's opinion in *Beilan* v. *Board of Education*, *supra*, at p. 405 is particularly pertinent:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."

We earnestly urge that petitioners have fulfilled these obligations of frankness, candor and cooperation. We respectfully submit that *Adler* and *Beilan* should not be extended to protect the unjustified onslaught on academic freedom and the right of free association shown by the record in these cases, and that the Court should hold that these petitioners have been deprived of their rights under the Fourteenth Amendment.

Conclusion

Wherefore, for the reasons hereinabove stated, the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

EDWIN E. DUNAWAY

Tower Building
Little Rock, Arkansas

Attorney for Petitioners

FILE COPY

FILED
NOV 1 1960
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, ~~1960~~

~~No. 14~~ No. 83

B. T. SHELTON, *et al.*, ... *Appellants*

v. No. 14

EVERETT TUCKER, JR., PRESIDENT, ETC., *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

MAX CARR, *et al.*, ... *Petitioners*

v. No. 83

R. A. YOUNG, *et al.*, ... *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ARKANSAS

BRIEF FOR RESPONDENTS

BRUCE BENNETT

Attorney General
State of Arkansas

THORP THOMAS

Assistant Attorney General
State of Arkansas

Attorneys for Respondents.

PARAGON PRINTING CO., LITTLE ROCK

INDEX.

	PAGE
Opinion of the Court Below	1
Jurisdiction	1
Question Presented	1
Statutes Involved	2
Statement	2
Argument	3
Conclusion	8

CITATIONS

CASES:

Adler *v.* Board of Education, 342 U.S. 483	3,6
Bates *v.* City of Little Rock, 361 U.S. 516	4
Beilan *v.* Board of Education, School District of Philadelphia, 357 U.S. 399	3
Garner *v.* Los Angeles Board of Public Works, 341 U.S. 716	3
Lerner *v.* Casey, 357 U.S. 468	3
N.A.A.C.P. *v.* Alabama, 357 U.S. 449	4

STATUTES:

Ark. Stats. (1947) §80-1229	2
Ark. Stats. (1947) §80-1230	2
Ark. Stats. (1947) §80-1231	2
Ark. Stats. (1947) §80-1232	2
Ark. Stats. (1947) §80-1304 (b)	4

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 14—No. 83

B. T. Shelton, *et al.*, *Appellants*

v. No. 14

Everett Tucker, Jr., President, etc., *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Max Carr, *et al.*, *Petitioners*

v. No. 83

R. A. Young, *et al.*, *Respondents*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 331 S.W. 2nd 701.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioners' brief.

QUESTION PRESENTED

This case involves the validity of the teacher-affidavit law, Act 10, Ark. Acts of 1958 special session. The

petitioners allege that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought, and allied rights, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Act 10, Ark. Acts of 1958 special session which appears as Ark. Stats. (1947) §§80-1229, 80-1230, 80-1231, 80-1232.

STATEMENT

The General Assembly of Arkansas at the Second Extraordinary Session of 1958 enacted Act 10, which Act was approved by the Governor of Arkansas and became effective on September 12, 1958.

Two suits attacking the validity of Act 10 were filed by the petitioners herein and these suits were consolidated in the trial court. Petitioners Max Carr, a Professor at the University of Arkansas and Ernest T. Gephardt, a teacher at Little Rock Central High School, brought these actions for themselves and others similarly situated.

As a condition precedent to employment, Act 10 requires the filing of an affidavit by all administrative personnel and teachers in the public schools, colleges and universities, listing all organizations of which they have been members or to which they have paid dues or made regular contributions within the past five years. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract and fix civil and criminal penalties for the willful filing of a false affidavit.

The petitioners have refused to execute the affidavit as required by Act 10.

ARGUMENT

The principal argument in this case is advanced by a companion brief filed by the other respondents herein which we adopt in its entirety.

Since other aspects of this case are adequately set forth in the companion brief this argument will be confined to the constitutionality of Act 10.

Act 10, unlike other legislative enactments considered by this Court, contains no discharge provision. It merely requires the local school boards and the governing bodies of institutions of higher learning to ascertain past and present organizational memberships of their respective faculties. The right of a public employer to know the organizations to which its employees belong has been recognized in *Garner* v. *Los Angeles Board of Public Works*, 341 U.S. 716; *Adler* v. *Board of Education of the City of New York*, 342 U.S. 483; *Beilan* v. *Board of Education, School District of Philadelphia*, 357 U.S. 399; and *Lerner* v. *Casey*, 357 U.S. 468.

In *Adler* v. *Board of Education of the City of New York, supra*, this Court said:

> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds*, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell*, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. . . "

The petitioners cannot demand that they be employed by the school authorities with no investigation of their backgrounds or present and past associations. If they feel that it would be to their detriment or foreign to their beliefs to comply with the provisions of Act 10 they are not forced to do so and are free to seek employment elsewhere. It is true that if they do not comply they can not be employed, but this fact does not deny them any constitutional right, for no teacher in the State of Arkansas has a vested right in his job. In Arkansas teachers are hired on a year-to-year basis and the only specific security that a teacher has beyond the end of a year is the statutory provision that if a teacher is not notified within 10 days after the end of a school year that his contract has not been renewed, it is automatically renewed for the following year. Ark. Stats. (1947) §80-1304(b).

Act 10 was not designed to abrogate the constitutional rights of any member of the teaching profession, but is designed as an aid to the school boards and governing bodies of the colleges and universities in determining an applicant's qualifications and fitness for employment in the respective institutions.

The petitioners further argue that Act 10, even if valid, is subject to being used in an unconstitutional manner. This argument is premised on the ground that, "a statute which compels disclosure of associations may be unconstitutional without further direct governmental action of a punitive nature, if the governmentally forced disclosure sets in motion private action which has the effect of depriving one of his constitutional rights". To support their argument they rely on *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449; and *Bates* v. *City of Little Rock*, 361 U.S.

516. These cases are readily distinguishable from the case at hand. In the *Alabama* case it was held that the Association could not be compelled by a State court to disclose its membership lists in connection with an action brought by the State on account of its alleged noncompliance with the Alabama statutes dealing with foreign corporations. This Court said: ". . . The issues in the litigation commenced by Alabama. . . were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slighest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them."

The *Bates* case turned on the same distinction that there was "no relevant correlation between the power of the municipalities to impose occupation license taxes and the compulsory disclosure and publication of membership lists of the local branches of the National Association for the Advancement of Colored People".

This Court has recognized many times the "relevancy" and "justification" of obtaining from employees lists of past and present organizations of which they have been, or are, members. It is quite clear that the employers in this case have abundant justification for discovery of the past and present associations of employees.

In further support of their "disclosure" argument the petitioners place their full weight on the testimony of Amis Guthridge. Even the petitioners must in all candor admit that Guthridge does not speak for any except a minority group in Arkansas. His testimony is

wholly insufficient to show that Act 10 will be applied by the State and its agencies in such a way as to violate the petitioners' constitutional rights. Rather the testimony of those actually charged with administering this law is the true criterion of its administration. The President of the University of Arkansas testified that the Board of Trustees had ordered the filed affidavits be held confidential and that they are in a locked file in the secretary's office (R.65). It is also clear from the record that the Little Rock School Board was treating the records confidential (R.77,78).

The petitioners' entire argument on "disclosure" must be summed up as being prospective in nature. This is an improper consideration when the constitutionality of an act is in issue. If a legislative enactment could be adjudged unconstitutional on the basis of hypothetical possibilities of abuse, then the constitutionality of practically every statute would be brought into question. But courts should "avoid constitutional adjudications on merely abstract or speculative issues". *Adler* v. *Board of Education, supra* (Frankfurter, J. dissenting).

If the petitioners' have any fear of the prospective application of Act 10 then their proper remedy will be to bring a suit challenging its unconstitutional use after such abuse has occurred. The Supreme Court of Arkansas at their own instance read into the Act a limitation not there expressed in the following language:

> "We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state 'with an evil eye and an unequal hand'. *Yick Wo* v. *Hopkins*, 118 U.S. 356."

Moreover, even if the affidavits should be made public it still cannot be speculated that any teacher would be discharged for the reason that Act 10 does not require a school board to take any action, regardless what associations are revealed.

CONCLUSION

The petitioners have defied a reasonable legislative enactment of the State of Arkansas. Nothing adduced at the trial shows that Act 10 has been applied in such a way as to violate the petitioner's constitutional rights or that the questioned legislation attempts to inquire about any association other than that properly authorized. The authorization is to secure information properly in aid of the school boards and governing bodies of the colleges and universities in selecting competent personnel.

The decision below was clearly correct. We respectively submit that the judgment below should be affirmed.

Respectfully submitted,

BRUCE BENNETT

Attorney General
State of Arkansas

THORP THOMAS

Assistant Attorney General
State of Arkansas

Attorneys for Respondents

October 27, 1960

SUPREME COURT OF THE UNITED STATES

Nos. 14 AND 83.—OCTOBER TERM, 1960.

B. T. Shelton, et al., Appellants, 14 *v.* Everett Tucker, Jr., etc., et al.	On Appeal From the United States District Court for the Eastern District of Arkansas.
Max Carr, et al., Petitioners, 83 *v.* R. A. Young, et al.	On Writ of Certiorari to the Supreme Court of Arkansas.

[December 12, 1960.]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Arkansas statute compels every teacher, as a condition of employment in a State supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. At issue in these two cases is the validity of that statute under the Fourteenth Amendment to the Constitution. No. 14 is an appeal from the judgment of a three-judge Federal District Court upholding the statute's validity, 174 F. Supp. 351. No. 83 is here on writ of certiorari to the Supreme Court of Arkansas, which also held the statute constitutionally valid. 106 Ark. Law Rep. 139, 331 S. W. 2d 701.

The statute in question is Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. The provisions of the Act are summarized in the opinion of the District Court as follows:

> "Act 10 provides in substance that no person shall be employed or elected to employment as a superin-

tendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license." 174 F. Supp. 353–354.[1]

[1] The statute is in seven sections. Section 1 provides: "It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided."

Section 2 provides: "No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by

These provisions must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statutory provision

---

public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions."

Section 3 sets out the form of affidavit to be used.

Section 4 provides: "Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence."

Section 5 provides that a teacher filing a false affidavit shall be guilty of perjury, punishable by a fine, and shall forfeit his license to

for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed. Ark. 1947 Stat. Ann. § 80–1304 (b) (1960); *Wabbaseka School District No. 7* v. *Johnson*, 225 Ark. 982, 286 S. W. 2d 841.

The plaintiffs in the Federal District Court (appellants here) were B. T. Shelton, a teacher employed in the Little Rock Public School System, suing for himself and others similarly situated, together with the Arkansas Teachers Association and its Executive Secretary, suing for the benefit of members of the Association. Shelton had been employed in the Little Rock Special School District for twenty-five years. In the spring of 1959 he was notified that, before he could be employed for the 1959–1960 school year, he must file the affidavit required by Act 10, listing all his organizational connections over the previous five years. He declined to file the affidavit, and his contract for the ensuing school year was not renewed. At the trial the evidence showed that he was not a member of the Communist Party or of any organization advocating the overthrow of the Government by force, and that he was a member of the National Association for the Advancement of Colored People. The court upheld Act 10, finding the information it required was "relevant," and relying on

---

teach in any school or other institution of learning supported wholly or in part by public funds."

Section 6 is a separability provision.

Section 7 is an emergency clause, reading in part as follows:

"It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

several decisions of this Court, particularly *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Education*, 357 U. S. 399; and *Lerner* v. *Casey*, 357 U. S. 468.[2]

The plaintiffs in the State court proceedings (petitioners here) were Max Carr, an associate professor at the University of Arkansas, and Ernest T. Gephardt, a teacher at Central High School in Little Rock, each suing for himself and others similarly situated. Each refused to execute and file the affidavit required by Act 10. Carr executed an affirmation[3] in which he listed his membership in professional organizations, denied ever having been a member of any subversive organization, and offered to answer any questions which the University authorities might constitutionally ask touching upon his qualifications as a teacher. Gephardt filed an affidavit stating that he had never belonged to a subversive organization, disclosing his membership in the Arkansas Education Association and the American Legion, and also offering to answer any questions which the school authorities might constitutionally ask touching upon his qualifications as a teacher. Both were advised that their failure to comply with the requirements of Act 10 would make impossible their re-employment as teachers for the following school year. The Supreme Court of Arkansas upheld the constitutionality of Act 10, on its face and as applied to the petitioners. 106 Ark. Law Rep. 139, 331 S. W. 2d 701.

---

[2] In the same proceeding the court held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions. 174 F. Supp. 351.

[3] The affirmation recited that Carr was "conscientiously opposed to taking an oath or swearing in any form . . . ."

I.

It is urged here, as it was unsuccessfully urged throughout the proceedings in both the Federal and State courts, that Act 10 deprives teachers in Arkansas of their rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. In considering this contention, we deal with two basic postulates.

First. There can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler* v. *Board of Education*, 342 U. S. 485, 493. There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." *Beilan* v. *Board of Education*, 357 U. S. 399, 406.[4]

This controversy is thus not of a pattern with such cases as *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the state's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a state's inquiry into the fitness and competence of its teachers.[5]

---

[4] The actual holdings in *Adler* and *Beilan*, involving the validity of teachers' discharges, are not relevant to the present case.

[5] The declared purpose of Act 10 is "to provide assistance in the administration and financing of the public schools . . . ." The declared justification for the emergency clause is "to assist in the solu-

Second. It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Bates* v. *Little Rock*, *supra*, at 522–523. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes.[6] The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless.[7] Even if

---

tion" of problems raised by "the decisions of the United States Supreme Court in the school segregation cases." See note 1. But neither the breadth and generality of the declared purpose nor the possible irrelevance of the emergency provision detract from the existence of an actual relevant state interest in the inquiry.

[6] The record contains an opinion of the State Attorney General that "it is an administrative determination, to be made by the respective Boards, as to the disclosure of information contained in the affidavits." The Supreme Court of Arkansas has held only that "the affidavits *need* not be opened to public inspection . . . ." 106 Ark. Law Rep. 139, 144, 331 S. W. 2d 701, 704. (Emphasis added.)

[7] In the state court proceedings a witness who was a member of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view to eliminating from the school system persons who supported organizations unpopular with the group. Among such organizations he named the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools.

there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion). "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate . . . ." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250.

II.

The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their

associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[9]

---

[8] In other areas, involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose. See *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241 (dissenting opinion); *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 83. But cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349.

[9] See Freund, Competing Freedoms in American Constitutional Law, 13 U. of Chicago Conference Series 26, 32–33; Richardson, Freedom of Expression and the Function of Courts, 65 Harv. L. Rev. 1, 6, 23–24; Comment, Legislative Inquiry into Political Activity: First Amendment Immunity From Committee Interrogation, 65 Yale L. J. 1159, 1173–1175.

In *Lovell* v. *Griffin*, 303 U. S. 444, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In *Schneider* v. *State*, 308 U. S. 147, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the Court noted that where legislative abridgment of "fundamental personal rights and liberties" is asserted, "the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." 308 U. S., at 161. In *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court said that "conduct remains subject to regulation for the protection of society," but pointed out that in each case "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 310 U. S., at 304. Illustrations of the same constitutional principle are to be found in many other decisions of the Court, among them, *Martin* v. *Struthers*, 319 U. S. 141; *Saia* v. *New York*, 334 U. S. 558; and *Kunz* v. *New York*, 340 U. S. 290.

As recently as last Term we held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose. *Talley* v. *California*, 362 U. S. 60. In that case the Court noted that it had been "urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited . . . . Therefore we do not pass

on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." 362 U. S., at 64.

The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 14 AND 83.—OCTOBER TERM, 1960.

B. T. Shelton, et al., Appellants, 14 v. Everett Tucker, Jr., etc., et al.	On Appeal From the United States District Court for the Eastern District of Arkansas.
Max Carr, et al., Petitioners, 83 v. R. A. Young, et al.	On Writ of Certiorari to the Supreme Court of Arkansas.

[December 12, 1960.]

MR. JUSTICE FRANKFURTER, dissenting.

As one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function, I may find displeasure with the Arkansas legislation now under review. But in maintaining the distinction between private views and constitutional restrictions, I am constrained to find that it does not exceed the permissible range of state action limited by the Fourteenth Amendment. By way of emphasis I therefore add a few words to the dissent of MR. JUSTICE HARLAN, in which I concur.

It is essential, at the outset, to establish what is not involved in this litigation:

(1) As the Court recognizes, this is not a case where, as in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516, a State, asserting the power to compel disclosure of organizational affiliations, can show no rational relation between disclosure and a governmental interest justifying it. Those cases are relevant here only because of their recognition that an interest in

privacy, in non-disclosure, may under appropriate circumstances claim constitutional protection. The question here is whether that interest is overborne by a countervailing public interest. To this concrete, limited question—whether the State's interest in knowing the nature of the organizational activities of teachers employed by it or by institutions which it supports, as a basis for appraising the fitness of those teachers for the positions which they hold, outweighs the interest recognized in *N. A. A. C. P.* and *Bates*—those earlier decisions themselves give no answer.

"(2) The Court's holding that the Arkansas statute is unconstitutional does not, apparently, rest upon the threat that the information which it requires of teachers will be revealed to the public. In view of the opinion of the Supreme Court of Arkansas, decision here could not, I believe, turn on a claim that the teachers' affidavits will not remain confidential. That court has expressly said that "inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone." 106 Ark. Law. Rep. 139, 144–145, 331 S. W. 2d 701, 704. If the validity of the statute depended on this matter, the pronouncement of the State's highest judicial organ would have to be read as establishing—the earlier view of the State Attorney General notwithstanding—that the statute does not authorize the making public of the affidavits. Even were the Arkansas court's language far more ambiguous than it is, it would be our duty so to understand its opinion, in accordance with the principle that "so far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed." *Fox* v. *Washington*, 236 U. S. 273, 277.

(3) This is not a case in which *Lovell* v. *Griffin*, 303 U. S. 444; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Saia* v. *New York*, 334 U. S. 558; and *Kunz* v. *New York*, 340 U. S. 290, call for condemnation of the "breadth" of the statute. Those decisions struck down licensing laws which vested in administrative officials a power of censorship over communications not confined within standards designed to curb the dangers of arbitrary or discriminatory official action. The "breadth" with which the cases were concerned was the breadth of unrestricted discretion left to a censor, which permitted him to make his own subjective opinions the practically unreviewable measure of permissible speech.[1] Nor is this a case of the nature of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Herndon* v. *Lowry*, 301 U. S. 242,[2] involving penal statutes which the Court found impermissibly "broad" in quite another sense. Prohibiting, indiscriminately, activity within and without the sphere of the Fourteenth Amendment's protection of free expression, those statutes had the double vice of deterring the exercise of constitutional freedoms by making the uncertain line of the Amendment's application determinative of criminality and of prescribing indefinite standards of guilt, thereby allowing the potential vagaries and prejudices of juries, effectively insulated

[1] See also *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147 (the Irvington ordinance); *Largent* v. *Texas*, 318 U. S. 418; *Jones* v. *Opelika*, 319 U. S. 103, vacating 316 U. S. 584 (the Opelika ordinance); *Niemotko* v. *Maryland*, 340 U. S. 268; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films, Inc.*, v. *Department of Education*, 346 U. S. 587; *Staub* v. *Baxley*, 355 U. S. 313; cf. *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517. The common-law count in the *Cantwell* case involved considerations similar to those which were determinative of the decisions cited in text and note, at note 2, *infra*.

[2] See also *Stromberg* v. *California*, 283 U. S. 359; *Winters* v. *New York*, 333 U. S. 507.

against control by reviewing courts, the power to intrude upon the protected sphere. The statute challenged in the present cases involves neither administrative discretion to censor nor vague, overreaching tests of criminal responsibility.

Where state assertions of authority are attacked as impermissibly restrictive upon thought, expression, or association, the existence *vel non* of other possible less restrictive means of achieving the object which the State seeks is, of course, a constitutionally relevant consideration. This is not because some novel, particular rule of law obtains in cases of this kind. Whenever the reasonableness and fairness of a measure are at issue—as they are in every case in which this Court must apply the standards of reason and fairness, with the appropriate scope to be given those concepts, in enforcing the Due Process Clause of the Fourteenth Amendment as a limitation upon state action—the availability or unavailability of alternative methods of proceeding is germane. Thus, a State may not prohibit the distribution of literature on its cities' streets as a means of preventing littering, when the same end might be achieved with only slightly greater inconvenience by applying the sanctions of the penal law not to the pamphleteer who distributes the paper but to the recipient who crumples it and throws it away. *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413. Nor may a State protect its population from the dangers and incitements of salacious books by restricting the reading matter of adults to that which would be harmless to the susceptible mind of a child. *Butler* v. *Michigan*, 352 U. S. 380. And see *DeJonge* v. *Oregon*, 299 U. S. 353; *Talley* v. *California*, 362 U. S. 60.[3] But the consideration

[3] Language characterizing state statutes as overly broad has sometimes been found in opinions where it was unnecessary to the result, and merely meant to express the idea that whatever state interest was

of feasible alternative modes of regulation in these cases did not imply that the Court might substitute its own choice among alternatives for that of a state legislature, or that the States were to be restricted to the "narrowest" workable means of accomplishing an end. *See Prince* v. *Massachusetts*, 321 U. S. 158, 169–170. Consideration of alternatives may focus the precise exercise of state legislative authority which is tested in this Court by the standard of reasonableness, but it does not alter or displace that standard. The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.

In the present case the Court strikes down an Arkansas statute requiring that teachers disclose to school officials all of their organizational relationships, on the ground that "many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." Granted that a given teacher's membership in the First Street Congregation is, standing alone, of little relevance to what may rightly be expected of a teacher, is that membership equally irrelevant when it is discovered that the teacher is in fact a member of the First Street Congregation *and* the Second Street Congregation *and* the Third Street Congregation *and* the 4–H Club *and* the 3–H Club *and* half a dozen other groups? Presumably, a

---

there asserted as underlying a regulation was insufficient to justify the regulation's application to particular circumstances fairly within the Fourteenth Amendment's protection. Compare *Thomas* v. *Collins*, 323 U. S. 516, with *Fiske* v. *Kansas*, 274 U. S. 380. Compare *Martin* v. *Struthers*, 319 U. S. 141, with *Breard* v. *Alexandria*, 341 U. S. 622.

teacher may have so many divers associations, so many divers commitments, that they consume his time and energy and interest at the expense of his work or even of his professional dedication.—Unlike wholly individual interests, organizational connections—because they involve obligations undertaken with relation to other persons—may become inescapably demanding and distracting. Surely a school board is entitled to inquire whether any of its teachers has placed himself, or is placing himself, in a condition where his work may suffer. Of course, the State might ask: "To how many organizations do you belong?" or "How much time do you expend at organizational activity?" But the answer to such questions could reasonably be regarded by a state legislature as insufficient, both because the veracity of the answer is more difficult to test, in cases where doubts as to veracity may arise, than in the case of the answers required by the Arkansas statute, and because an estimate of time presently spent in organizational activity reveals nothing as to the quality and nature of that activity, upon the basis of which, necessarily, judgment or prophesy of the extent of future involvement must be based. A teacher's answers to the questions which Arkansas asks, moreover, may serve the purpose of making known to school authorities persons who come into contact with the teacher in all of the phases of his activity in the community, and who can be questioned, if need be, concerning the teacher's conduct in matters which this Court can certainly not now say are lacking in any pertinence to professional fitness. It is difficult to understand how these particular ends could be achieved by asking "certain of [the State's] teachers about all their organizational relationships," or "all of its teachers about certain of their associational ties," or all of its teachers how many associations currently involve them, or during how many hours; and difficult, therefore,

to appreciate why the Court deems unreasonable and forbids what Arkansas does ask.

If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. See *Wieman* v. *Updegraff*, 344 U. S. 183, 194 (concurring opinion); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 255 (concurring opinion). It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. I am unable to say, on the face of this statute, that Arkansas could not reasonably find that the information which the statute requires—and which may not be otherwise acquired than by asking the question which it asks—is germane to that selection. Nor, on this record, can I attribute to the State a purpose to employ the enactment as a device for the accomplishment of what is constitutionally forbidden. Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment. It will be time enough, if such use is made, to hold the application of the statute unconstitutional. *See Yick Wo* v. *Hopkins*, 118 U. S. 356. Because I do not find that the disclosure of teachers' associations to their school boards is, without more, such a restriction upon their liberty, or upon that of the community, as to overbalance the State's interest in asking the question, I would affirm the judgments below.

I am authorized to say that MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER agree with this opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 14 and 83.—October Term, 1960.

B. T. Shelton, et al., Appellants, 14 v. Everett Tucker, Jr., etc., et al.	On Appeal From the United States District Court for the Eastern District of Arkansas.
Max Carr, et al., Petitioners, 83 v. R. A. Young, et al.	On Writ of Certiorari to the Supreme Court of Arkansas.

[December 12, 1960.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Whittaker join, dissenting.

Of course this decision has a natural tendency to enlist support, involving as it does an unusual statute that touches constitutional rights whose protection in the context of the racial situation in various parts of the country demands the unremitting vigilance of the courts. Yet that very circumstance also serves to remind of the restraints that attend constitutional adjudication. It must be emphasized that neither of these cases actually presents an issue of racial discrimination. The statute on its face applies to *all* Arkansas teachers irrespective of race, and there is no showing that it has been discriminatorily administered.

The issue is whether, consistently with the Fourteenth Amendment, a State may require teachers in its public schools or colleges to disclose, as a condition precedent to their initial or continued employment, all organizations to which they have belonged, paid dues, or contributed within the past five years. Since I believe that such a requirement cannot be said to transgress the constitu-

tional limits of a State's conceded authority to determine the qualifications of those serving it as teachers, I am bound to consider that Arkansas had the right to pass the statute in question, and therefore conceive it my duty to dissent.

The legal framework in which the issue must be judged is clear. The rights of free speech and association embodied in the "liberty" assured against state action by the Fourteenth Amendment (see *DeJonge* v. *Oregon*, 299 U. S. 353, 364; *Gitlow* v. *New York*, 268 U. S. 652, 672, dissenting opinion of Holmes, J.) is not absolute. *Near* v. *Minnesota*, 283 U. S. 697, 708; *Whitney* v. *California*, 274 U. S. 357, 373 (concurring opinion of Brandeis, J.). Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the questioned action has substantial relevance thereto. See *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 360 U. S. 72.

In the two cases at hand, I think both factors are satisfied. It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. See *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Higher Education*, 357 U. S. 399; see also *Slochower* v. *Board of Education*, 350 U. S. 551. Furthermore, I take the Court to

acknowledge that agreeably to our previous decisions, the State may enquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. These cases therefore do not present a situation such as we had in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516, where the required disclosure bears no substantial relevance to a legitimate state interest.

Despite these considerations this statute is stricken down because, in the Court's view, it is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify the inhibition on freedom of association which so blanket an inquiry may entail. Cf. *N. A. A. C. P.* v. *Alabama, supra*; *Bates* v. *Little Rock, supra*.

I am unable to subscribe to this view because I believe it impossible to determine *a priori* the place where the line should be drawn between what would be permissible inquiry and over-broad inquiry in a situation like this. Certainly, the Court does not point that place out. There can be little doubt that much of the associational information called for by the statute will be of little or no use whatever to the school authorities, but I do not understand how those authorities can be expected to fix in advance the terms of their enquiry so that it will yield only relevant information.

I do not mean to say that alternatives such as an enquiry limited to the names of organizations of whose character the State is presently aware, or to a class of organizations defined by their purposes, would not be more consonant with a decent respect for the privacy of the teacher, nor that such alternatives would be utterly unworkable. I do see, however, that these alternatives suffer from deficiencies so obvious where a State is bent upon discovering everything which would be relevant to its proper purposes, that I cannot say that it must, as a matter

of constitutional compulsion, adopt some such means instead of those which have been chosen here.

Finally, I need hardly say that if it turns out that this statute is abused, either by an unwarranted publicizing of the required associational disclosures or otherwise, we would have a different kind of case than those presently before us. See *Lassiter* v. *Northampton Elections Board*, 360 U. S. 45, 53–54. All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional.

I would affirm in both cases.

Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the [fol. 176] same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of

this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

APPROVED: SEPTEMBER 12, 1958

[fol. 177]

EXHIBIT No. "7"

STATE OF ARKANSAS
OFFICE OF ATTORNEY GENERAL

COPY

May 27, 1959

Honorable George N. Anderson
County Line School Dist. No. 1
Branch, Arkansas

Dear Mr. Anderson:

This will acknowledge your letter of May 18, 1959, concerning the affidavits as required by Act 10 and Act 30 of the 1959 Arkansas General Assembly.

I am of the opinion that the word (swear) may be stricken out and the word (affirm) may be substituted in its place.

Your very truly,

BRUCE BENNETT
Attorney General

/s/ BILL J. DAVIS
By: Bill J. Davis
Assistant Attorney General

BJD:jmh

[fol. 178] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 180]

IN THE SUPREME COURT OF ARKANSAS

No. 5-1978

MAX CARR et al., Appellants,

v.

R. A. YOUNG et al., Appellees.

Appeal from Pulaski Chancery Court, First Division; Murray O. Reed, Chancellor.

Affirmed.

OPINION—February 8, 1960

GEORGE ROSE SMITH, Associate Justice

George Rose Smith, J. This case involves the validity of the teacher-affidavit law, Act 10 of the 1958 special session. The appeal is from a declaratory decree upholding the statute.

Two suits were consolidated in the trial court. In one the appellant Carr, an associate professor of music at the University of Arkansas, acting for himself and others similarly situated, sought a decree declaring the act unconstitutional and enjoining its enforcement by the defendants, the president and trustees of the University. The other case is a similar class suit brought by the appellant Gephardt, a vocational printing instructor at Little Rock Central High School, asking for like relief against the Little Rock Special School District and its superintendent and directors. Both plaintiffs assert that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought, and allied rights, all protected by the Fourteenth Amendment and by parallel provisions in the Arkansas constitution.

Act 10 provides that no person shall be employed as a teacher in any of the state's public schools or as a super-

intendent or principal in any elementary or secondary [fol. 181] school without having first filed with the employing authority an affidavit giving the names and addresses of all organizations and associations to which the applicant has belonged within the preceding five years or to which he has paid regular dues or made regular contributions within that time. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract, and fix civil and criminal penalties for the willful filing of a false affidavit.

The appellants' attack upon the act may be considered in two aspects: First, is Act 10 unconstitutional on its face? Secondly, if the act is outwardly valid, does the record show that the statute was intended to be applied, and will in fact be applied, in such a way as to deprive the appellants and those they represent of their constitutional rights?

We do not find Act 10 to be invalid on its face. By § 1 of the act the legislature declared its belief that the public school system would be benefited as a result of the school authorities having the required information about applicants for the positions covered by the statute. It cannot be doubted that the information would often be of real value to the employing school board. We are not convinced that either the federal or the state constitution compels a school board to engage its teachers without first inquiring about the matters that the act requires to be disclosed.

A similar question was presented long ago, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517, where a policeman complained of a city regulation that prohibited him from soliciting money or aid for political purposes. In the familiar words of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . the city may impose any reasonable condition upon holding offices within its control."

[fol. 182] The appellants are not entitled to demand that the University and the Little Rock school board employ them without making any inquiry about organizations to which they have belonged within a period reasonably close

to the date of the application. Such investigations are the usual practice among private employers, and, as the court pointed out in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, public employers are not denied the privilege of making similar inquiries. From that opinion: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *prima facie* validity of Act 10 is pretty well settled by the holding in *Adler* v. *Board of Education of New York*, 342 U.S. 485, where the court sustained a state statute forbidding the employment in the public school system of persons belonging to organizations found to be subversive. This language in the opinion is peculiarly pertinent to the case at bar:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time [fol. 183] immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10.

We conclude, as did the three-judge district court in *Shelton* v. *McKinley*, D.C. Ark., 174 F. Supp. 351, that the act is not unconstitutional on its face. We do not, of course, pass upon the wisdom of the law, for as the court said in the *Shelton* case: "We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government."

There remains the contention that Act 10, even if ostensibly valid, is subject to being used in an unconstitu-
[fol. 184] tional manner. Upon this point the appellants offered three witnesses. Two of them, the Attorney General, whose office assisted in the drafting of the bill, and the state senator who introduced the measure in the legislature, testified that the act was intended as a weapon against subversion. Such expressions of individual opinion are not competent to show the legislative intention, *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W. 2d 1007, but even if the testimony were considered it would not create any doubt about the validity of the act.

The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States

Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.

We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state "with an evil eye and an unequal hand." *Yick Wo* v. *Hopkins*, 118 U.S. 356.

Here, however, the proof does not show any inclination on the part of any school board to use Act 10 in a discriminatory manner. The most that can be said is that at [fol. 185] least some members of the Citizens Councils are so ill-advised as to advocate that course. "Ill-advised" is the proper term, since such an effort, if successful, would defeat its own purpose by rendering the act invalid.

It is very far from certain that efforts to misuse Act 10, if any are made, will succeed. Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone. The only testimony on this point indicates that the affidavits are not being publicized; the president of the University testified that its affidavits are being treated as confidential and are being kept under lock and key.

Moreover, even if secrecy should not be observed in every instance it still cannot be surely predicted that any teacher will be eliminated from the school system. Unlike the statute upheld in the *Adler* case, *supra*, which mandatorily forbade the employment of persons belonging to subver-

sive organizations, Act 10 does not affirmatively require a school board to take any action, no matter what associations an affidavit may reveal. Thus in order for us to invalidate Act 10 at this stage of its existence we should have to assume, wholly without proof, that conscientious and responsible school board members will inevitably yield to a nebulous public insistence that the act be applied discriminatorily and in disregard of recognized constitutional guarantees. We are aware of no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid.

Affirmed.

[fol. 186]

IN THE SUPREME COURT OF ARKANSAS

MAX CARR, et al., Appellants,

vs.

R. A. YOUNG, et al., Appellees.

Appeal from Pulaski Chancery Court, First Division.

JUDGMENT—February 8, 1960

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, First Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellants all their costs in this Court, in this cause expended, and have execution thereof.

February 8, 1960.

[fol. 187] [File endorsement omitted]

IN THE SUPREME COURT OF ARKANSAS

Pulaski Chy., 1st Div.

No. 5-1978

MAX CARR et al., Appellants,

v.

R. A. YOUNG et al., Appellees.

PETITION FOR REHEARING—Filed February 16, 1960

Petitioners move that the Court grant a rehearing in captioned cause for the following reason:

The opinion is bottomed upon the erroneous premise that so long as no direct discriminatory action by public officials is based upon the compelled disclosure of associations required by Act 10, that First and Fourteenth Amendment rights of petitioners are not violated. The resultant interplay of governmental and private action set in motion by Act 10, in successfully dissuading teachers from exercising their constitutional rights, or making them targets of abuse if they do, through the publicity made possible by the Act, is ignored by the Court.

Edwin E. Dunaway, Solicitor for Appellants.

BRIEF IN SUPPORT OF PETITION

The admirable admonition contained in the Court's opinion against the use of Act 10 for the purpose for which it was enacted does not alter the fact that the Act makes no requirement that the information in the affidavits be [fol. 188] treated as confidential. There is, consequently, provided by Act 10, with no necessity to justify it, the means by which teachers are subjected to the immediate possibility of publication of their past and present associations.

The United States Supreme Court recognized in *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, at p. 1172, that

such publication "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

That court then answered this Court's argument that whatever repressive effect resulted from compelled disclosure follows from *private*, not *state* action. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exercise of state power represented by the production order that private action takes hold," said the court at p. 1172.

In *Watkins* v. *United States*, 354 U.S. 178, 77 S.Ct. 1173, at p. 1184, the United States Supreme Court also recognized the constitutional evil of unnecessary forced revelations about possibly unpopular associations and the resultant deterrent effect upon one's exercising constitutional rights.

CERTIFICATE

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. Copies have been served upon opposing counsel by mailing same on February 16, 1960.

Edwin E. Dunaway

[fol. 189]

IN THE SUPREME COURT OF ARKANSAS

No. 5-1978

MAX CARR, et al., Appellants,

vs.

R. A. YOUNG, et al., Appellees.

ORDER DENYING PETITION FOR REHEARING—
February 29, 1960

Rehearing denied.

February 29, 1960.

[fol. 190] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 191]

SUPREME COURT OF THE UNITED STATES

No. 917, October Term, 1959

MAX CARR, et al., Petitioners,

vs.

R. A. YOUNG, et al.

ORDER ALLOWING CERTIORARI—June 20, 1960

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted. The case is set for argument immediately following No. 541. Each case is allotted one hour and thirty minutes for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.